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No. 95-512

In The

Supreme Court of the United States

October Term, 1995

JEANIE M. BOYETTE,

Petitioner,

vs.

AMERICAN INTERNATIONAL ADJUSTMENT COMPANY, INC. and AMERICAN INTERNATIONAL GROUP, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Petitioner filed a state law claim of negligent supervision and retention against Respondents on the grounds that Respondents permitted their employees to discriminate against Petitioner before and after Petitioner testified in an unrelated Age Discrimination in Employment Act (hereinafter "ADEA") lawsuit that was filed against Respondents. The courts below found and affirmed that under Georgia law, Respondents did not have a legal duty to prevent their employees from discriminating against Petitioner. Under the ADEA, however, federal law provides a legal duty not to discriminate based on an individual's opposition to age discrimination or an individual's testimony or participation in a proceeding or litigation based on age discrimination. The first issue before this Court is whether the supremacy clause of the United States Constitution requires the States to recognize a legal duty created by the Congress of the United States as if the legal duty had emanated from the States' own legislatures so that a breach of such legal duty may be the basis for a negligence cause of action under State law.

2. The courts below awarded and affirmed costs of this litigation to Respondents even though there was a specific finding Respondents had violated the ADEA by discriminatorily demoting Petitioner because she had testified against them in an ADEA proceeding. In Petitioner's Complaint, she specifically pled that the District Court order Respondents from engaging in such behavior in the future. As Petitioner's lawsuit was the catalyst for stopping Respondents' unlawful future conduct against other employees, the second issue before this Court is whether Petitioner is the prevailing party and thus entitled to an award of costs, including attorneys' fees, or, in the least, not subject to the payment of Respondents' costs.

3. The courts below ordered and affirmed that Petitioner could not amend her Complaint to add a claim of intentional infliction of emotional distress because of undue delay and undue prejudice. When Petitioner filed her original Complaint, the law in Georgia was that Petitioner's factual situation would not support such a claim. Thereafter, however, the Georgia Supreme Court concluded in an unrelated case that such facts would support a claim for intentional infliction of emotional distress. Within days of the Court's decision, Petitioner motioned to amend her Complaint, but the motion was denied. The third issue before this Court is whether undue delay and undue prejudice are present when a plaintiff seeks to amend her Complaint to add a new State law cause of action immediately after the State's supreme court recognizes such a cause of action.

4. The courts below ordered and affirmed that Petitioner could not present any evidence at trial regarding emotional distress on the grounds that Petitioner had failed to state such damages in her interrogatory responses. The fourth issue before this Court is whether Petitioner had a duty to supplement her interrogatory response to include damages for emotional distress and the factual basis from which they arose, even though Respondents already had this information; and whether Federal Rule of Civil Procedure 26(e) requires a nonexpert witness to supplement her responses in the exact manner that experts are required to supplement their responses.

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The opinion of the Eleventh Circuit Court of Appeals is not reported. The opinion of the United States District Court for the Northern District of Georgia is reported at *Boyette v. American Int'l Adjustment Co.*, 1994 U.S. Dist. Lexis 4594 (N.D. Ga. 1994).

STATEMENT OF JURISDICTION

The District Court entered its judgment on March 31, 1994. On May 24, 1995, the Eleventh Circuit Court of Appeals affirmed. Petitioner subsequently petitioned the Court of Appeals for a rehearing which was denied on June 28, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, § 2 of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."

Federal Rule of Civil Procedure 54(d) provides that "costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs."

42 U.S.C. § 1988 provides in relevant part: In any action or proceeding to enforce a provision of [§ 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs.

Federal Rule of Civil Procedure 15(a) provides in pertinent part:

> [a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Federal Rule of Civil Procedure 8(a) states:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing the that pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Prior to the 1993 Amendment to Federal Rule of Civil Procedure 26(e), the rule stated:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial. . . .
>
> (2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

STATEMENT OF THE CASE

A. Brief Statement of the Facts

Plaintiff-Petitioner Jeanie Boyette (hereinafter "Boyette") was employed by Respondent American International Adjustment Company, Inc. (hereinafter "AIAC") in its Atlanta, Georgia office from April 1984 until her termination on April 18, 1989. Respondent AIAC is a subsidiary company of Respondent American International Group, Inc. (hereinafter "AIG").

During Boyette's employment as supervisor, a co-worker, Lois Holman, brought an age discrimination action against Respondents under the ADEA (the Holman case[1]). As Boyette was known as being close to Holman and that she would have knowledge concerning the age discrimination claim, Boyette was considered to be a key witness in the case. (R15-66/7-10, R15-70-71, R15-86).

Prior to Boyette's deposition testimony, she was issued a thirty-day written work performance warning. On the day before her scheduled deposition, however, the thirty-day warning was withdrawn. On September 23, 1988, Boyette gave deposition testimony in the *Holman* case. This testimony was very damaging to Respondents, and particularly damaging to Service Center Manager Cibulski. In fact, Cibulski stated that he wanted to "get rid of her" because Boyette's testimony was damaging. (R15-92/7-13). The next day, Boyette was notified that her thirty-day work performance warning was being extended.

On September 26, 1988, Boyette wrote a memorandum to Cibulski and sent a copy to Regional Manager Cannegieter, complaining that the warning was extended because of her deposition testimony. Cannegieter was supervised by Regional Vice President Richard Powers.

The jury in the case *sub judice* found, and the District Court acknowledged that during the remaining months of her employment, Boyette was singled out and harassed because she gave testimony in the underlying age discrimination case. On April 12, 1989, the *Holman* case was settled. Within one week of the *Holman* settlement, on April 18, 1989, Boyette was informed that she was being immediately demoted from her position as

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1. This case was captioned as *Holman v. American International Adjustment Co., Inc.*, 1:88-CV-1277-ODE (N.D. Ga).

supervisor. The decision to demote Boyette was communicated to her in a special meeting with Cannegieter and Cibulski. (R16-246-247). When Boyette questioned the demotion, she was given an ultimatum by Cannegieter to either accept the demotion or be terminated. Boyette was humiliated by the demotion ultimatum, which she believed was being given in retaliation for her testimony in the *Holman* case. Accordingly, she declined to accept the illegal demotion. Respondents thereupon terminated Boyette for alleged insubordination.

B. Course of Proceedings and Jurisdiction in the Courts Below

On April 23, 1990, Boyette filed a four-count Complaint against Respondents in the United States District Court for the Northern District of Georgia. Jurisdiction was conferred upon the District Court by Section 7(c) of the ADEA. Boyette alleged that she was the subject of retaliation for her giving deposition testimony against Respondents in the *Holman* case. Count I of the Complaint alleged retaliation in violation of the ADEA; Count II alleged a claim for tortious termination and breach of contract; Count III alleged that Respondents attempted to influence Boyette's testimony as a witness in the *Holman* case; a violation of the Georgia RICO (Racketeer Influenced and Corrupt Organizations) Act, O.C.G.A. § 16-14-1 *et seq.*; and Count IV alleged that Respondents were negligent in supervising and retaining Cannegieter and Cibulski under Georgia law leading to Boyette's injury.

On September 4, 1991, the District Court entered an Order on Respondents' Motion for Summary Judgment. The District Court granted Respondents' Motion in regard to Counts II and III, the tortious termination and breach of contract claims and the Georgia Civil RICO claim.

On November 15, 1991, Boyette sought leave of court to amend her Complaint to allege a claim for intentional infliction of emotional distress. The District Court entered an Order on January 16, 1992 denying Boyette's motion to amend her Complaint. The Court found undue delay on the part of Boyette and that undue prejudice would result if the amendments were allowed. Further, on September 4, 1992, the District Court entered an Order granting Respondents' Motion In Limine to bar Boyette from testifying about, offering evidence on, or making any reference to emotional distress during the trial as the trial court found that Boyette failed to timely supplement her responses to damage interrogatories.

The trial of this action began on September 7, 1993. The trial was trifurcated and the jury found for Boyette in three separate Special Interrogatory Verdicts. Specifically, with respect to the first special interrogatory, the jury found that Respondents had demoted Boyette in retaliation for her testimony in the *Holman* case.[2] In the second phase of the trial, the jury found that both Cannegieter and Cibulski made the decision to demote Boyette, that both AIG and AIAC were negligent in supervising and retaining Cannegieter and Cibulski, and that Respondents' negligence was the legal cause of Boyette's demotion.

As to the damages portion of the trial, the jury found in favor of Boyette and awarded $3,768 in back pay against Respondents, $1,256 in compensatory damages against Respondents, $1,000,000 in punitive damages against Respondent AIAC, and $0 in punitive damages against Respondents AIG. Judgment reflecting the jury verdicts was entered on September 14, 1993.

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2. The special interrogatory submitted to the jury only addressed the demotion aspect of the case. The jury was not asked to specifically decide the discharge claim.

After the jury's determination of retaliation, negligence, and damages, the District Court entered an Order on March 31, 1994 granting Respondents' Post-trial Motion for Judgment as a Matter of Law and conditionally granting Respondents' Motion for New Trial. The court then granted judgment to Respondents and assessed costs against Boyette.

Boyette subsequently appealed to the Eleventh Circuit Court of Appeals, pursuant to 28 U.S.C. § 1291, which provides that the Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States. Boyette appealed: (1) the Order granting Respondents' Motion for Summary Judgment concerning Counts II and III of Boyette's Complaint, *i.e.*, the common law tort and contract claims and the Georgia Civil RICO claim; (2) the Order denying Boyette's motion to amend her Complaint to include a claim for intentional infliction of emotional distress under Georgia law; (3) the Order granting Respondents' Motion in Limine to bar Boyette from testifying about, offering evidence on, or making any reference to emotional distress during trial; (4) the Order granting Respondents' post-trial motion for judgment as a matter of law and conditionally granting Respondents' Motion for New Trial; and (5) the Order granting judgment to Respondents and assessing costs against Boyette.

On May 24, 1995, the Eleventh Circuit Court of Appeals affirmed, without opinion, each of the above Orders of the District Court. Boyette subsequently petitioned for a rehearing but was denied on June 28, 1995. Boyette now files this Petition for a Writ of Certiorari to correct the wrongs committed by the Eleventh Circuit Court of Appeals for the State of Georgia.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT'S APRIL 1, 1994 ORDER GRANTING RESPONDENTS' POST-TRIAL MOTION FOR JUDGMENT AS A MATTER OF LAW CONCERNING BOYETTE'S CLAIM FOR NEGLIGENT SUPERVISION AND RETENTION WAS ERRONEOUS AS A MATTER OF LAW BECAUSE BOYETTE SUFFERED AN ACTIONABLE INJURY UNDER GEORGIA STATE LAW AS MANDATED UNDER THE UNITED STATES CONSTITUTION.

At oral argument of this matter before the Eleventh Circuit Court of Appeals, Judge Birch raised the critical question of federal preemption in the field of Georgia employment law. The application of federal preemption in state employment law cases is extremely relevant in that federal preemption defines the scope of state law duties employers owe to employees by taking congressionally created federal duties and applying them to the states as if the state legislatures had created such duties themselves.

The District Court in this case granted judgment as a matter of law against Boyette by concluding there were no actionable injuries under Georgia law regarding at will employees. As an at will employee, Boyette could be terminated or demoted for any or no reason because the rule in Georgia generally allows an employer to discharge an employee at will for any or no reason, and that the employer's motives in discharging such an employee are legally immaterial. *See Lane v. K-Mart Corp.*, 190 Ga. App. 113, 378 S.E. 2d 136 (1989). Thus, even though the jury here found pecuniary damages for common law pain and suffering due to Boyette being harassed and demoted for giving testimony in

the *Holman* case, the District Court found that Boyette had no cause of action under Georgia law as she was an at will employee.

The court relied upon Georgia's at will doctrine to annul Boyette's common law claims of negligent supervision and retention which are predicated upon the breach of a legal duty. It is Boyette's contention that such a duty towards her existed without regard to the employment at will doctrine. It is Boyette's contention that to ignore such a duty would be to abrogate the doctrine of federal preemption.

In addressing the proposition that an at will employee can be terminated for any or no reason, the Georgia Supreme Court has specifically noted that "[t]his proposition may not apply to discharge for a reason that is impermissible on grounds of public policy, such as a discharge based on race." *A.L. Williams & Assoc.v. Faircloth*, 259 Ga. 767, 769 (3c), n. 4, 386 S.E. 2d 151, 154 (1989). Subsequently, the Georgia Court of Appeals in *Borden v. Johnson*, 196 Ga. App. 288, 395 S.E. 2d 628 (1990), held:

> In this state there clearly do exist certain viable "public policy" exceptions to the proposition that the employment of an at-will employee can be terminated for any reason whatsoever or for no reason at all. However, each of these "public policy" exceptions was created by the legislature, not by the courts. . . .

Id., 196 Ga. App. at 290, 395 S.E. 2d at 629.

The Georgia Court of Appeals then concluded that the legislature of the State of Georgia had indeed created certain public policy exceptions to this State's employment at will

doctrine. For example, the court pointed to O.C.G.A. § 18-4-7 (which prohibits the discharge of any employee because his earnings have been subjected to garnishment for any one indebtedness); O.C.G.A. § 34-1-2 (which criminalizes the discharge of employees on the basis of age); O.C.G.A. § 34-1-3 (which authorizes an employee who was discharged for attending a judicial proceeding in response to a court order or process to recover damages and attorney's fees); O.C.G.A. § 34-6A-1 *et seq.* (which authorizes an employee who was allegedly discharged as the result of a handicap to initiate a civil action). *Id.*

As such, when the state legislature creates a duty, the derivative tort of negligent supervision and retention is actionable, as the duty gives rise to the obligation. The failure to obey the obligation resounds in tort. The critical issue here is whether or not the State of Georgia recognizes the legal duty imposed upon the states by the Congress of the United States.

Article VI, § 2 of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." Pursuant to the Constitution, Congress in 1967 enacted the Age Discrimination in Employment Act. As such, the ADEA is the supreme law of the land.

> When Congress, in the exertion of the power confided to it by the Constitution, adopted that act [the ADEA], it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of [the State of Georgia] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the state.

Mondou v. New York, 223 U.S. 1, 57, 32 S. Ct. 169, 178 (1911); *Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 810, 814 (1947); *Howlett by and through Howlett v. Rose*, 110. S. Ct. 2430, 2440 (1990).

The ADEA provides that it shall be unlawful not only to discriminate on the basis of age but also to discriminate based on an individual's opposition to age discrimination or an individual's charge, testimony, assistance, or participation in an investigation, proceeding, or litigation based on age discrimination. 29 U.S.C. § 623(d). In *A.L. Williams, supra*, the Georgia Supreme Court identified race as a public policy exception to the employment at will doctrine. In *Borden, supra*, the Georgia Court of Appeals recognized a public policy exception to the employment at will doctrine when it emanated from the State legislature so that a party may bring a state law cause of action against his or her former employer. Accordingly, since the public policy behind the ADEA, *i.e.*, that an employee may not legally be retaliated against for testifying in an ADEA proceeding, is binding upon this State as if it flowed directly from the General Assembly, this Court must recognize this as public policy of this State and allow Boyette's negligent supervision and retention claim to stand.[3]

In other words, Congress created a legal duty prohibiting retaliation for testifying in an age discrimination case. This duty is applicable to the State of Georgia just as if the Georgia Legislature passed the ADEA itself. *See Howlett, supra.* As a legal duty prohibits retaliation, Georgia tort common law must

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3. Boyette also relies upon the above argument as to the public policy exception to the Georgia at will doctrine in her argument that the trial court erred in granting summary judgment to Respondents on Count II of Boyette's Complaint, *i.e.* the wrongful demotion and discharge claim. In short, as Georgia recognizes a public policy exception to the at will doctrine for demotions and discharges that are based on retaliation for giving testimony, Count II of Boyette's Complaint should have been allowed to proceed to trial.

prohibit a company's negligently allowing such retaliation, regardless of any "at will" common law principal.

In its April 1, 1994 Order granting Respondents' Post-trial motion for judgment as a matter of law concerning Boyette's claim for negligent supervision and retention, the District Court concluded that "the only underlying act to the negligent supervision claim was the personal decision to demote plaintiff." The jury in this case found that Respondents' had retaliatorily demoted Boyette in violation of the ADEA, and the District Court subsequently allowed the jury's determination to stand. In short, the District Court concluded that even though Respondents' did retaliate against Boyette in the form of demoting her, as the jury specifically found, Boyette was not entitled to any damages for this egregious act. Boyette, has in essence, won the battle but lost the war. This reasoning ignores the fact that a legal duty has been created to which the States must be bound. To conclude that only the legislature of a specific state can create exceptions to the doctrine of employment at will, and not Congress will gut the system of federal preemption.

Accordingly, the federal duty of an employer not to demote an employee under the ADEA as a result of the employee testifying against the employer is a duty that must be recognized by the states as if the states themselves created this duty. Georgia therefore *must follow* this duty, and not allow Respondents' supervisors to retaliate and harass individuals brave enough to cooperate with our judicial system by giving truthful testimony. The jury found, and the District Court upheld, the fact that Respondents have violated this mandated duty.[4]

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4. In addressing the issue of punitive damages, the District Court stated that because it had entered judgment as a matter of law against Boyette on her negligent supervision and retention claim, Respondents were entitled to judgment as a matter of law on the issue of punitive damages. Assuming *arguendo* that this Court accepts Boyette's above stated arguments regarding her claim of negligent supervision and retention, Boyette would thus be entitled to punitive damages under Georgia law.

II.

THE COURTS BELOW COMMITTED ERROR BY AWARDING AND AFFIRMING COSTS OF THIS ACTION TO RESPONDENTS.

Federal Rule of Civil Procedure 54(d) provides that costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs, while 42 U.S.C. § 1988 provides that the court may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs. Boyette shows this Court that she, not the Respondents, was the prevailing party, and that as such, the courts below committed error by awarding and affirming Respondents costs pursuant to Rule 54(d). Moreover, Boyette, as the prevailing party, is entitled to an award of costs under Rule 54(d) and attorney's fees under §1988.

Specifically in this case, the jury found Petitioners had demoted Boyette in retaliation for her testimony in the *Holman* case, and the District Court subsequently found there was indeed an actual controversy and that a declaration of Boyette's legal rights was appropriate. In the second phase of the trial, the jury found that both Cannegieter and Cibulski made the decision to demote Boyette, that both AIG and AIAC were negligent in supervising and retaining Cannegieter and Cibulski, and that Respondents' negligence was the legal cause of Boyette's demotion. As to the damages portion of the trial, the jury found in favor of Boyette and awarded $3,768 in back pay against Respondents, $1,256 in compensatory damages against Respondents, and $1,000,000 in punitive damages against Respondent AIAC.

The standards for determining whether a party is entitled to an award of costs under Rule 54(d) are the same for determining

whether a party is prevailing under 42 U.S.C. § 1988. *Fulton Federal S&L Ass'n of Atlanta v. American Ins.*, 143 F.R.D. 292 (N.D. Ga. 1991). Generally, the litigant in whose favor judgment is rendered is the prevailing party for purposes of both Rule 54(d) and § 1988.

> It is well settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment — e.g., monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Hewitt v. Helms, 482 U.S. 755, 759, 107 S. Ct. 2672, 2675 (1987).

As such, when a defendant changes its conduct so that it redresses the plaintiff's grievances, the plaintiff will be deemed to be the prevailing party, even if there is no formal judgment in the plaintiff's favor. This is the catalyst theory. Otherwise stated, if the plaintiff's legal action is the catalyst for the defendant changing its egregious conduct, the plaintiff has prevailed. The defendant stopped whatever it was doing which caused the plaintiff to commence the litigation in the first place.

In *Hewitt, supra,* this Court declined to decide the circumstances, under which the catalyst theory could justify an attorney's fee award under § 1988. However, in *Farrar v. Hobby,* 113 S. Ct. 566 (1992), this Court noted its "generous formula" under which "plaintiffs may be considered prevailing parties for attorney's fees purposes if they succeed on any significant issue

in litigation which obtains some of the benefits sought in bringing suit." *Id.*, 113 S .Ct. at 572 (citations omitted). Although this Court had not completely resolved the issue, most circuits have either expressly or implicitly affirmed the continued viability of the catalyst theory of recovery of attorney's fees. *See Paris v. U.S. Dept of Housing and Urban Development*, 988 F.2d 236, 238 (1st Cir. 1993); *Marbley v. Bane*, 57 F.3d 224, 234 (2nd Cir. 1995); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 550 (3rd Cir. 1994); *Craig v. Gregg County, Texas*, 988 F.2d 18, 20-21 (5th Cir. 1993); *Citizens Against Tax Waste v. Westerville City School District Board of Education*, 985 F.2d 255, 257-58 (6th Cir. 1993); *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994); *Little Rock School District v. Pulaski County Special School District 1*, 17 F.3d 260, 263 n 2 (8th Cir. 1994); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1009 (9th Cir. 1995); *American Council of the Blind of Colorado, Inc. v. Romer*, 992 F.2d 249, 251 (10th Cir.), *cert. denied*, __U.S. __, 114 S. Ct. 184 (1993); *Royal Crown Cola Co. v. Coca-Cola Company*, 887 F.2d 1480 (11th Cir. 1989); *Tucson Medical Center v. Sullivan*, 947 F.2d 971 (D.C. Cir. 1991); *but also see S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49, 51 (4th Cir.) (en banc), *cert. denied*, __ U.S. __, 115 S. Ct. 205 (1994).

In *Marbley, supra*, plaintiffs, who were low-income tenants, sued the Commissioner of New York State Department of Social Services and others to seek an allotment from funds block-granted by the federal government to the State of New York to subsidize heating costs for the tenants. Specifically, the complaint sought declaratory and injunctive relief, as well as money damages. The district court granted each party partial summary judgment, and even though the State rescinded its illegal policy three days after the plaintiffs filed their motion for summary judgment, the district court rejected plaintiffs' application for attorney's fees. By sharp contrast, the Second

Circuit on appeal held that the plaintiffs would indeed be the prevailing party, despite losing on summary judgment, if the plaintiffs' litigation was indeed the catalyst for the change in State illegal policy. The case was then remanded to the district court for a determination of whether the plaintiffs' litigation was a legally sufficient cause of the change in the policy and — if so — the amount, if any, of reasonable attorney's fees. *Marbley*, 57 F.3d at 235.

The one aspect of the catalyst theory that has not been addressed by this Court is whether the success the plaintiff obtains must benefit the plaintiff directly or whether it can solely benefit others. In *Marbley, supra*, the illegal policy that the State rescinded had the effect of benefiting the specific plaintiffs, as well as benefitting each and every low-income tenant who did not join the suit. In the case *sub judice*, the only people to benefit from the courts' rulings are Respondents' employees. Boyette cannot benefit because she has already been terminated. By this Court using such sweeping language in *Farrar, supra*, — the "generous formula" under which "plaintiffs may be considered prevailing parties for attorney's fees purposes if they succeed on *any significant issue* in litigation which obtains some of the benefits sought in bringing suit." — this Court has left the door open as to whether the success the plaintiff obtains may benefit only persons other than the plaintiff, as long as the plaintiff has requested such relief.

Here, Boyette is the prevailing party, even though she did not receive any monetary benefit, because her litigation was a substantial factor in causing Respondents to abandon their illegal practice of retaliating against their employees under the ADEA. From the day this case was commenced, Boyette specifically sought to have Respondents stop their retaliatory conduct. Plaintiff's original Complaint, filed on April 23, 1990, specifically included in part "F" of the prayer for relief "that

Defendants be Ordered to cease and desist from engaging in retaliatory, and unlawful practices against its employees."

Respondents' conduct not only trampled upon the rights of Boyette, it trampled upon the rights of Holman. The jury specifically found that Respondents retaliated against Boyette because of her truthful testimony in Holman's lawsuit. Moreover, Respondents trampled upon the rights of Boyette's coworkers, who saw how their employer treated those who were in the unenviable situation of testifying against Respondents. This had the unfortunate effect of chilling the rights of all Respondents' workers.

As stated, the District Court specifically concluded that Respondents did indeed demote Boyette for fulfilling her legal obligations. Boyette contends that this judgment has caused Respondents to stop this unlawful conduct. In short, Boyette requests that this case be remanded to the District Court for a determination as to whether there has indeed been a change in Respondents' conduct, and if so, whether the litigation in this case was a legally sufficient cause of the change in Respondents' conduct. The amount of reasonable attorney's fees and costs to be awarded to Boyette must then be determined.

III.

THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED BOYETTE'S MOTION TO AMEND HER COMPLAINT TO INCLUDE A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

Federal Rule of Civil Procedure 15(a) provides three expressed circumstances in which a party may amend its pleading, only the first two expound specific time constraints. The third merely provides that the court may allow a party leave

to amend its pleading if justice so requires. It is only the third circumstance, when justice requires, that is in issue presently.

Although the granting of a party's motion for leave to amend is discretionary, the general rule is that district courts have only limited discretion to deny a party leave to amend, and that the courts are constrained to allow plaintiffs to amend unless there are substantial countervailing reasons. *See Shiner v. Eastern Airlines, Inc.*, 868 F.2d 401, 407 (11th Cir. 1989); *Halliburton and Associates, Inc. v. Henderson, Few & Co.*, 774 F.2d 411 (11th Cir. 1985); and *Mullinax v. McNabb-Wadsworth Trucking Co.*, 117 F.R.D. 694 (N.D.Ga. 1987). Examples of reasons justifying the denial of leave to amend a party's pleading include undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of the amendment. *Shiner, supra; Mullinax, supra; Foman v. Davis*, 371 U.S. 178, 182 (1962); and *Matthew v. City of Atlanta*, 699 F. Supp. 1552 (N.D. Ga. 1988).

In its January 15, 1992 Order, the District Court denied Boyette's motion to amend her Complaint to add a claim for intentional infliction of emotional distress on the grounds of (1) undue delay and (2) undue prejudice. As the following will show, the District Court has abused its discretion because neither undue delay nor undue prejudice were present in the case *sub judice*.

A. There Was No Undue Delay Because from November 16, 1990 to November 1, 1991, Boyette Could Not Have Amended her Complaint to Allege a Claim for Intentional Infliction of Emotional Distress.

Boyette was terminated from Respondents' employ on April 18, 1989. Boyette faced a two-year statute of limitations as

provided under O.C.G.A. § 9-3-33. She filed suit on April 23, 1990. As such, Boyette had until April 18, 1991 to bring additional claims against Respondents. One of these additional claims Boyette would have liked to allege was intentional infliction of emotional distress.

The tort of intentional infliction of emotional distress is a well-recognized cause of action under Georgia law. *Bridges v. Winn-Dixie Atlanta, Inc.*, 176 Ga. App. 227, 229, 335 S.E. 2d 445, 447 (1980). However, in 1990 the Georgia Court of Appeals substantially narrowed this cause of action. In *Yarbray v. Southern Bell Tel. & Tel. Co.*, 197 Ga. App. 846, 399 S.E. 2d 718 (1990), *aff'd in part, rev'd in part*, 261 Ga. 703, 409 S.E. 2d 835 (1991) (hereinafter *Yarbray I*), the Court of Appeals addressed a case remarkably analogous to the case *sub judice*. The plaintiff in the case, Shirley Yarbray, brought an action against her former employer alleging intentional infliction of emotional distress, along with an invasion of privacy claim. Like Boyette, Yarbray alleged that her employer had attempted to influence her testimony in an age discrimination case brought by a co-worker against the defendant employer. When Yarbray refused to falsely testify in favor of her employer, her employer retaliated by demoting her. The trial court found that the employer's actions *could not* support a claim for intentional infliction of emotional distress and granted the employer's motion for summary judgment.

On review, the Court of Appeals affirmed, stating that as a matter of law the employer's actions were not so "terrifying or insulting as naturally to humiliate, embarrass or frighten the plaintiff". *Id.* 197 Ga. App. at 851, 399 S.E.2d at 723 (*citing Bridges*, 176 Ga. App. at 229). Approximately one year later on November 1, 1991, however, the Georgia Supreme Court decided *Yarbray v. Southern Bell Tel. & Tel. Co.*, 261 Ga. 703, 409 S.E. 2d 835 (1991) (hereinafter *Yarbray II*). The court held that the

actions of Yarbray's employer would, as a matter of law, meet the threshold which reasonable persons would consider outrageous and extreme enough to support Yarbray's claim.

When the Court of Appeals decided *Yarbray I* and held that the facts as alleged were not sufficiently outrageous to give rise to a claim of intentional infliction of emotional distress, the Court of Appeals was stating a legal standard. Subsequently, when the Georgia Supreme Court overturned the Court of Appeals' decision and stated that the facts as alleged were sufficiently outrageous to give rise to a claim of intentional infliction of emotional distress, the Supreme Court was redefining this legal standard. Boyette could not have, in good faith, brought a claim for intentional infliction of emotional distress until *Yarbray II*. Had she done so, Rule 11 sanctions could have been imposed.

Only three days after the Georgia Supreme Court's *Yarbray II* decision was reported, however, Boyette filed her Motion for Leave to Amend her Complaint to add a claim for intentional infliction of emotional distress. When there is a change or clarification in the law governing a point that is the subject matter of a proposed amendment, as is the case *sub judice*, leave to amend should be granted liberally. *See Teamsters Pension Trust Fund v. CBS Records*, 103 F.R.D. 83 (E.D. Penn. 1984) (citing *Strachan v. Ashe*, 548 F. Supp. 1193 (D.C. Mass. 1982). In light of such a change, there is no undue delay.

B. Respondents Would Not Suffer Undue Prejudice Because the Factual Allegations Asserted in Boyette's Original Complaint Supported a Claim of Intentional Infliction of Emotional Distress.

Boyette's amendment to add a claim for intentional infliction of emotional distress arises out of the same transaction and occurrence as she alleged in her original Complaint. The

facts that Boyette alleged, and upon which the District Court found as sufficient evidence to go to a jury on a claim for retaliation under the ADEA, are the same allegations which give rise to her claim for intentional infliction of emotional distress under the Georgia Supreme Court's decision in *Yarbray II*. Boyette's amendment to her Complaint merely sets forth a new legal theory of liability against Appellees. As such, under the rule of notice pleading as found in F.R.C.P. 8(a), the allegations set forth in Boyette's original complaint sufficiently placed Respondents on notice of the theory of intentional infliction of emotional distress. *American Credit Corp. v. United States Cas. Co.*, 49 F.R.D. 314 (N.D. Ga. 1969). Further, Respondents would not have suffered any undue prejudice because no additional discovery would have been necessary. Discovery as to the allegations of retaliation under the ADEA already facilitated the discovery of the same facts as would discovery under a claim for intentional infliction of emotional distress.

In denying Boyette's motion for leave to amend, the District Court concluded that the facts presented *sub judice* were neither analogous to those in the *Yarbray* decisions nor outrageous enough to support an intentional infliction of emotional distress claim. This conclusion is incorrect. As Boyette pointed out in her two briefs in support of her motion, the facts which she originally alleged are incredibly analogous to the facts as alleged by Yarbray. Like Yarbray's employer, Respondents instituted a variety of actions which had the effect of attempting to influence an employee's testimony. The only substantial difference is that unlike Boyette, Yarbray was not terminated. She was instead transferred to another position and given the same pay and benefits. Surely, Boyette being unjustly discharged from her employment because of her refusal to commit perjury is far more outrageous and egregious than merely being given a transfer with equal pay and benefits.

IV.

THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT GRANTED RESPONDENTS' MOTION IN LIMINE TO BAR BOYETTE FROM TESTIFYING ABOUT, OFFERING EVIDENCE ON, OR MAKING ANY REFERENCE TO EMOTIONAL DISTRESS DURING TRIAL.

After the District Court denied Boyette's motion to amend to add a claim for intentional infliction of emotional distress, Respondents sought a Motion in Limine to exclude any evidence at trial regarding emotional distress. In granting this motion, the trial court incorrectly concluded that Boyette had failed to state the facts upon which she based her claim for emotional distress damages. The District Court additionally came to an erroneous conclusion that Boyette had a duty to specifically plead damages of emotional distress. Furthermore, the Court applied the wrong test when it found that Boyette had failed to seasonably supplement her interrogatory response when she added emotional distress damages to her response in November 1991.

A. Boyette Supplemented Her Interrogatory Response to Include Damages for Emotional Distress and the Factual Basis from Which They Arose.

Approximately seven months after Boyette filed her original Complaint, Respondents took her deposition on November 27, 1990. Subsequently, Respondents served interrogatories upon Boyette in February of 1991. Interrogatory No. 3 requested information pertaining to Boyette's prayer for relief. On March 14, 1991, Boyette responded. Although she did not list emotional distress in Interrogatory No. 3 as damages sought, Boyette did state that she would "supplement her answer in accordance with the Federal Rules of Civil Procedure." At no time did

Respondents' counsel request Boyette to supplement her responses with respect to damages claimed. (March 26, 1991, letter from Michael Cramer to Steven Leibel). Nothing was heard from Respondents concerning further supplementation of discovery until November 14, 1991. During the interim, a Motion for Summary Judgment had been filed by Respondents, and it was only after the motion was ruled upon, dismissing Counts II and III of Boyette's Complaint, that the parties returned to address further supplementation of the interrogatories. (November 14, 1991, letter from Michael Cramer to David Ates).

On November 15, 1991, Boyette sought leave of court to amend her Complaint to allege intentional infliction of emotional distress in accordance with the Georgia Supreme Court's *Yarbray II* decision. Ten days later, Boyette supplemented her response to Interrogatory No. 3 to include damages for emotional distress. (November 25, 1991, letter from David Ates to Michael Cramer). Respondents subsequently requested further supplementation with respect to the "factual basis for each damage claimed in each cause of action" on December 18, 1991. (December 18, 1991, letter from Michael Cramer to David Ates). Boyette immediately agreed to provide further supplemental responses, (December 19, 1991, correspondence from David Ates to Michael Cramer), and on January 5, 1992, Boyette supplemented her response to Interrogatory No. 3 to state that the factual basis for her emotional distress damages was the same as those giving rise to her claims under the Age Discrimination in Employment Act and her alleged Georgia tort claims. (January 5, 1992, letter from David Ates to Michael Cramer). As such, when Respondents asked, they were put on notice of Boyette's claims of emotional damages.

B. The District Court Applied the Wrong Test When It Concluded that Boyette Failed to Seasonably Supplement Her Interrogatory Response.

Although Boyette was not under a duty to supplement her interrogatory response to include damages for emotional distress,

she did supplement Interrogatory No. 3 in November 1991 to include these damages. Nevertheless, the District Court excluded all evidence of emotional distress during the trial because the Court concluded Boyette waited too long to supplement. In so doing, the District Court abused its discretion. Prior to the 1993 Amendment to Federal Rule of Civil Procedure 26(e), the rule stated:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial. . . .
>
> (2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

In accordance with subparagraph (e)(1), the circuit courts have held that when determining whether *expert testimony*

should be excluded because of a party's failure to comply with the rule, four factors will be taken into account: (1) the explanation, if any, for the failure to name the witness; (2) the importance of the testimony of the witness; (3) the need for time to prepare to meet the testimony; and (4) the possibility of a continuance. *See Alimenta (U.S.A.), Inc. v. Anheuser-Busch Co.*, 803 F.2d 1160, 1163 (11th Cir. 1986). The only time this four-factor test has been used by any court, including the Fifth and Eleventh Circuits, is in regard to testimony of expert witnesses under subparagraph (e)(1).[5] Nevertheless, in its Order granting Respondents' motion in limine, the District Court erroneously applied this test to subparagraph (e)(2)(B).

Subparagraph (e)(2)(B) is separate and distinct from subparagraph (e)(1). As such, different tests are to be used. Under subparagraph (e)(2)(B), which is at the center of the dispute in the case *sub judice*, the courts have uniformly concentrated on whether the failure to supplement constitutes a knowing concealment:

> The strong term "knowing concealment" is designed ... to protect a party who is reasonable in believing either that the change that has made his answer no longer accurate is known to his opponent or that it is a matter of no importance.

Fortino v. Quasar Co., 950 F.2d 389, 396 (7th Cir. 1991).

Under this controlling test, there was no "knowing concealment". Instead, Boyette was quite reasonable in her

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5. *Rock v. Dixie Insurance Co.*, 897 F.2d 1346, 1348 (*5th Cir.* 1990) and *Fabrica Italiana Lavorazione Materie Organiche, S.A. v. Kaiser Aluminum & Chemical Corp.*, 684 F.2d 776, 780 (*11th Cir.* 1982).

belief that Respondents knew of Boyette's damages for emotional distress because under the requirement of notice pleading, as stated above, Respondents were put on notice of Appellant's emotional distress damages. Further, Boyette amended her response to Interrogatory No. 3 to include emotional distress damages approximately *two years* before the case actually went to trial. Since Respondents were aware of these damages from November 1991 to the time the trial commenced in September 1993, it is inconceivable that this change to Boyette's interrogatory response was not known to Respondents. In short, there was no evidence of knowing concealment on the part of Boyette.

Further, where a party seeking exclusion never raised the issue of unanswered interrogatories and never suggested that discovery was not complete, as occurred in the case *sub judice* in which Respondents did not request further supplementation until November 1991, exclusion should be denied. *Zurzolo v. General Motors,* 69 F.R.D. 469 (E.D. Penn. 1975). Accordingly, the District Court abused its discretion when it excluded all evidence of emotional distress in September 1992, one year before the case went to trial.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted

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APPENDIX A — DENIAL OF PETITION FOR REHEARING OF UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JUNE 28, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8528

JEANIE M. BOYETTE,

Plaintiff-Appellant,

versus

AMERICAN INTERNATIONAL ADJUSTMENT COMPANY, INC., AMERICAN INTERNATIONAL GROUP, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

BEFORE: KRAVITCH and BIRCH, Circuit Judges, and GOODWIN*, Senior Circuit Judge.

PER CURIAM:

The petition for rehearing filed by appellant, Jeanie M. Boyette, is *denied.*

ENTERED FOR THE COURT:

s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

---

* Honorable Alfred T. Goodwin, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

APPENDIX B — OPINION OF UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MAY 24, 1995

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8528

D. C. Docket No. 1:90-cv-875-WCO

JEANIE M. BOYETTE,

Plaintiff-Appellant,

versus

AMERICAN INTERNATIONAL ADJUSTMENT COMPANY, INC., AMERICAN INTERNATIONAL GROUP, INC.,

Defendants-Appellees.

Appeal from the United States District Court
Northern District of Georgia

(May 24, 1995)

Before KRAVITCH and BIRCH, Circuit Judges, and GOODWIN*, Senior Circuit Judge.

PER CURIAM:

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* Honorable Alfred T. Goodwin, Senior U. S. Circuit Judge for the Ninth Circuit, sitting by designation.

Appendix B

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

"Costs taxed against plaintiff-appellant."

Judgment Entered: May 24, 1995
For the Court: Miguel J. Cortez, Clerk

By: s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: 7/10/95

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1. 11th Cir. R. 36-1 provides:

> When the court determines that any of the following circumstances exist:
>
> (a) judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> (b) the evidence in support of a jury verdict is sufficient;
>
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
>
> (d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
>
> (e) judgment has been entered without a reversible error of law;
>
> and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX C — JUDGMENT OF UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA FILED APRIL 12, 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO.
1:90-cv-875-WCO

JEANIE M. BOYETTE

Plaintiff,

vs.

AMERICAN INTERNATIONAL ADJUSTMENT COMPANY, INC., and AMERICAN INTERNATIONAL GROUP INC.

Defendants.

JUDGMENT

This action having come before the court, the Honorable William C. O'Kelley, United States District Chief Judge, for consideration of defendants' motion for judgment as a matter of law, alternative motion for a new trial, and the court having granted in part its motion for judgment as a matter of law, it is

Ordered and Adjudged that the plaintiff take nothing, that defendants are entitled to judgment as a matter of law on the issues of retaliatory discharge under the ADEA and negligent retention and supervision under Georgia tort law and on all

damages issues, that defendants recover from plaintiff costs of this action.

Dated at Atlanta, Georgia, this 12th day of April, 1994.

Luther D. Thomas, Clerk
By : s/ Pam Shirley
Pam Shirley
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
April 12, 1994
Luther D. Thomas, Clerk

By : s/ Pam Shirley
Pam Shirley
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION FILED MARCH 31, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL NO. 1:90-CV-875-WCO

JEANIE M. BOYETTE,

Plaintiff

VERSUS

AMERICAN INTERNATIONAL ADJUSTMENT COMPANY, INC., and AMERICAN INTERNATIONAL GROUP, INC.,

Defendants

ORDER

The captioned case is before the court on plaintiff's motion for a hearing on equitable relief, on defendants' motion for judgment as a matter of law, on defendants' alternative motion for a new trial, on plaintiff's motion for leave to file a sur-reply, on defendants' motion to strike plaintiff's sur-reply, and on plaintiff's petition for attorneys' fees, costs, and expenses. After careful review and for the reasons stated herein, the court grants in part defendants' motion for judgment as a matter of law [156-1], denies plaintiff's motion for leave to file [168-1], denies as moot defendant's motion to strike [171-1], conditionally grants defendants' motion for a new trial [155-1], denies plaintiff's motion for a hearing [154-1], and denies as moot plaintiff's

petition for attorneys' fees, costs, and expenses [157-1].[1]

FACTUAL AND PROCEDURAL HISTORY

Prior to April 18, 1989, plaintiff was employed by defendant American International Adjustment Company, Inc. ("AIAC"). Defendant American International Group, Inc. ("AIG") is the parent company to AIAC. Plaintiff was employed as supervisor of the "Alabama Unit" and her work was supervised by Joe Cibulski, Service Center Manager, who was supervised by Ron Cannegieter, Regional Manager. On August 22, 1988, plaintiff was issued a written warning about her job performance. Immediately following the warning, plaintiff's job performance improved to the extent that she was complimented on her work and was named supervisor of the month. In 1989, however, plaintiff's job performance again deteriorated. In early April, 1989, Cibulski and Cannegieter decided to reassign plaintiff from supervisor to claims adjuster, a demotion. On April 18, 1989, plaintiff met with Cannegieter who informed plaintiff that she was to be reassigned but that her pay would not be reduced. Plaintiff refused the new assignment. Cannegieter advised plaintiff that if she did not accept the reassignment her employment would be terminated. Plaintiff continued to refuse the new assignment and Cannegieter discharged her for insubordination.

Prior to plaintiff's discharge, Lois Holman, one of plaintiff's former co-workers, had filed an age discrimination claim against defendants under the Age Discrimination in Employment Act

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1. On November 4, 1993, the court signed a consent order specifying that, because defendants had filed motions for a new trial and for judgment as a matter of law, the prevailing party should submit a petition for attorney's fees twenty days after the court rules on defendants' motions.

("ADEA"). Plaintiff agreed to testify on Holman's behalf and was deposed in the *Holman* case. The *Holman* case settled without going to trial.

Plaintiff filed the captioned case alleging various state and federal claims. On September 7, 1993, the case went to trial on plaintiff's claims of retaliatory demotion and retaliatory discharge under the ADEA and on plaintiff's state claim of negligent supervision and retention. The trial was trifurcated and the jury found, in three separate Special Interrogatory Verdicts, that 1) defendants had demoted plaintiff in retaliation for her testimony in the *Holman* case, 2) that both Cannegieter and Cibulski made the decision to demote plaintiff, that both AIG and AIAC were negligent in supervising and retaining both Cannegieter and Cibulski, and the negligence of AIG and AIAC was the legal cause of plaintiff's demotion, and 3) that plaintiff should be awarded damages due to lost wages in the amount of $3,768.00, compensatory damages in the amount of $1,256.00, punitive damages against AIAC in the amount of $1,000,000.00, and punitive damages against AIG in the amount of $0.00. Judgment reflecting the jury verdicts was entered in the captioned case on September 14, 1993.

On September 16, 1993, plaintiff filed a motion for a hearing as to the granting of equitable relief available under the ADEA. On September 22, 1993, defendants filed both a motion for a new trial and a post-trial motion for judgment as a matter of law. On October 4, 1993, plaintiff filed a petition for an award of attorneys' fees, costs, and expenses. On October 19, plaintiff filed a memorandum opposing the motion for judgment as a matter of law and, on October 26, 1993, a memorandum opposing the motion for a new trial. On October 22, 1993, defendants filed their opposition to the petition for attorneys' fees. On November

Appendix D

1, 1993, the parties filed a consent order allowing resubmission of the petition for attorneys' fees after the court ruled on the motions for a new trial and for judgment as a matter of law. On November 5, 1993, defendants filed a reply brief supporting the motion for judgment as a matter of law and, on November 9, 1993, defendants filed a reply brief supporting the motion for a new trial. On December 1, 1993, plaintiff filed both a motion to file a sur-reply in opposition to the motion for a new trial and the sur-reply itself. On December 10, 1993, defendants filed a response opposing plaintiff's motion for leave to file a sur-reply brief and a motion to strike the sur-reply brief.

MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendants' Arguments

Defendants initially noted that there were three liability issues in the captioned case: retaliatory demotion under the ADEA, retaliatory discharge under the ADEA, and negligent supervision and retention under Georgia tort law. Defendants requested that the court enter judgment as a matter of law on all three issues. Defendants further noted that there were three damages issues: back pay, compensatory damages, and punitive damages. Defendants requested that the court enter judgment for AIG according to the jury verdict on issue of punitive damages and that the court enter judgment as a matter of law for AIAC on the issue of punitive damages and for both defendants on the issues of compensatory damages and back pay.

Defendants argued that plaintiff's state law negligence claim must fail as a matter of law for four independent reasons: Georgia's employment at-will doctrine prohibits holding an employer liable in negligence for personnel decisions, even if

those decisions are unlawful and violate federal or state laws, because "the heart of the employment at-will doctrine is the right to make personnel decisions without being subjected to tort liability;" Georgia law does not permit tort liability for negligent supervision and retention when the underlying act, the act which was allegedly negligently permitted, was within the employee's scope of duties; Georgia law permits tort liability for negligent actions only if the action resulted in physical injury; Georgia's workers' compensation laws contain exclusivity provisions which prohibit any recovery by plaintiff in tort for injuries received at the workplace. Defendants argued that plaintiff's ADEA claim for retaliatory discharge must fail as a matter of law because the undisputed facts, that plaintiff's demotion would not have involved a reduction in pay and that plaintiff refused to perform the assigned work without even trying the new position, do not support a finding of constructive discharge and do support a finding that plaintiff was discharged for insubordination.[2] Defendants argued that plaintiff's ADEA claim for retaliatory demotion must fail as a matter of law[3] because there is no relief to which plaintiff is entitled: the ADEA does not provide for either compensatory or nominal damages and plaintiff's demotion resulted in no actual damages as the demotion was without a reduction in pay and as plaintiff was legitimately discharged within forty-five minutes of the demotion.

Defendants argued that plaintiff is not entitled to punitive

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2. Defendants noted that the issue of retaliatory discharge was never submitted to the jury and that the court must either hold that defendants are entitled to judgment as a matter of law or hold a trial on the claim.

3. Defendants noted that they believe the jury finding that plaintiff was demoted in retaliation for her testimony in the *Holman* case was contrary to the overwhelming weight of the evidence.

damages because she failed to prove by clear and convincing evidence that someone in a position to exert supervisory control over Cibulski and Cannegieter negligently failed to do so. Defendants argued that, to sustain an award for punitive damages, plaintiff had to prove that defendants' actions showed either willful misconduct or a conscious indifference to consequences; that, because the jury found that both Cibulski and Cannegieter had made the decision to demote plaintiff, the willful misconduct or conscious indifference had to be that of someone in a supervisory position over Cibulski and Cannegieter; that the willfulness or conscious indifference had to be proved by "clear and convincing evidence;" and that plaintiff had failed to meet the requisite standard of proof as to each element. Defendants noted that no "Georgia appellate court [cases have] upheld a punitive damages award against an employer in a *negligent supervision or retention* case" (emphasis in original) and argued that punitive damages are precluded in the captioned case by the Georgia statute which prohibits punitive damages where "the entire injury is to the peace, happiness, or feelings of the plaintiff." O.C.G.A. § 51-12-6. Defendants argued that plaintiff is not entitled to any compensatory damages because compensatory damages are not available under the ADEA; because plaintiff "failed to disclose that she sought compensatory damages until more than a year after discovery closed;" and because the court, in its September 3, 1992 order, precluded plaintiff from making reference to emotional distress during the trial and, although plaintiff "contended that damages for 'pain and suffering' are different than damages for 'emotional distress[,]' [the distinction] is patently ridiculous." Finally, defendants argued that plaintiff is not entitled to back pay because plaintiff suffered no actual damages from her demotion and there is no provision in the ADEA for nominal damages.

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Plaintiff's Arguments

Plaintiff initially argued that the court should let the jury's decision stand as to both liability and damages. Next, stating that defendants arguments were "disingenuous, insufficient, and fail[ed] as a matter of fact and law," plaintiff argued that Georgia law provides for negligent retention and supervision actions; that, under federal law, plaintiff was constructively discharged; that the jury was sufficiently charged on the elements of plaintiff's claims; that the jury specifically found retaliation under the ADEA and negligence under Georgia law; that constructive discharge can be reasonably inferred from the jury verdict; and that plaintiff is entitled to judgment on her ADEA demotion claim. Plaintiff also argued that the jury was sufficiently charged on each element of damages; that there was sufficient evidence for the jury to award punitive damages; and that back pay and compensatory damages are appropriate.

Plaintiff argued that the Georgia courts have allowed negligent retention and supervision claims in sexual harassment and discrimination cases and that such actions cannot be distinguished from plaintiff's retaliation case; that Georgia law does not require the underlying act of a negligent supervision and retention claim to be outside the scope of an employee's job duties; that Georgia law requires only that the underlying act occur during the actor's working hours and that the actor be acting under color of employment; that the underlying action in the captioned case, retaliation for testifying in the *Holman* case, was taken outside the scope of the employment of Cibulski and Cannegieter as it was an illegal action; that negligent supervision or retention cases are not limited to cases involving physical injuries; and that negligent supervision and retention claims are not barred by the Georgia worker's compensation law.

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Plaintiff argued that the ADEA does not prohibit recovery of nominal damages and that declaratory judgment of liability is permitted under the ADEA. Plaintiff further argued that the fact that the jury awarded plaintiff back pay approximately equal to the pay plaintiff lost as a result of her discharge shows that the jury "actually concluded that Plaintiff was unlawfully discharged from her position." Plaintiff also argued that the fact that she "suffered harassment from the time of her deposition until the ti[m]e of her termination, roughly seven months" shows that plaintiff met "her burden of demonstrating a constructive discharge due to a continuing regiment [sic] of retaliation."

Plaintiff argued that it was not necessary to prove that someone above Cibulski and Cannegieter acted willfully or with conscious indifference and that proof of Cannegieter's willfully negligent supervision of Cibulski was sufficient. Plaintiff further argued that Richard Powers, Cannegieter's boss, was consciously indifferent to Cibulski's propensities to retaliate. Plaintiff also argued that defendants' argument that the Georgia Code prohibits punitive damages in the captioned case is untimely as it had not been raised prior to defendants' motion for judgment as a matter of law.

Plaintiff argued that she is entitled, under the Georgia Code, to recover special damages "regardless of whether she identified special damages in her discovery responses." Further, plaintiff argued that, in her supplemental discovery responses, she did indicate that she was seeking compensatory damages on her state law claims and that defendants' motion in limine sought only to exclude emotional distress damages and not other types of compensatory damages.

Finally, plaintiff argued that she is entitled to back pay

because the jury apparently found that plaintiff's discharge was unlawful. Plaintiff argued that there is a split as to whether nominal damages are available under the ADEA and that Georgia law permits an award of nominal damages where "an injury is small or the mitigating circumstances are strong." O.C.G.A. § 51-12-4.

Defendants' Reply

In replying to plaintiff's opposition to the motion for judgment as a matter of law, defendants did not raise any new arguments. Defendants, instead, reiterated arguments they had previously made and pointed to alleged fallacies in plaintiff's arguments. Defendants argued that the cases upon which plaintiff relied for the proposition that negligence is not precluded in the captioned case were all sexual harassment cases which are distinguishable because the actionable conduct in each case was not a personnel decision. Plaintiff noted that the jury was not asked and did not find that plaintiff had been harassed and that the jury was not asked and did not find that plaintiff had been subjected to retaliatory discharge.

Defendants argued that plaintiff did not show any unlawful action which Cibulski took on his own; that the decision to demote plaintiff was made jointly with Cannegieter; and that Cannegieter's supervision of Cibulski, even if it was willfully negligent or consciously indifferent, cannot support a punitive damages award against defendants. Defendants also noted that both plaintiff and Reggie Bailey testified that Powers was not indifferent to plaintiff's concerns but that Powers actually protected plaintiff as long as he was Cannegieter's supervisor. Thus, defendants argued, Powers was not consciously indifferent to the possibility of retaliation.

Appendix D

Legal Standard and Analysis

> Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. . . . If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law.

Fed. R. Civ. P. 50(b). "If . . . a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party." Fed. R. Civ. P. 50 (a)(1).

In the captioned case, defendants moved for judgment as a matter of law at the end of the presentation of evidence. No ruling on the motion for judgment as a matter of law was made and the issues were submitted to the jury. Defendants' renewed motion for judgment as a matter of law is, therefore, appropriate. The court will individually address the legal and evidentiary basis for each part of defendants' motion for judgment as a matter of law.

1) Retaliatory Discharge

The ADEA prohibits retaliatory discharge whether actual or constructive. *Flanagan v. McKesson Corp.*, 708 F. Supp. 1287, 1288 (N.D. Ga. 1988) (citing *Garner v. Wal-Mart Stores. Inc.*,

807 F.2d 1536 (11th Cir. 1987)), *aff'd without opinion*, 874 F.2d 820 (11th Cir. 1989). "Constructive discharge occurs when 'working conditions become so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Id.* However, "part of an employee's obligation to be *reasonable* is an obligation not to assume the worst, and not to jump to conclusions too fast." *Id.* at 1289 (emphasis in original). In *Flanagan*, an employee was demoted from a management position to a sales representative position but never reported to the new position because he found the demotion humiliating. The evidence suggested that the employee would generate sufficient income in the new position to avoid a pay cut. The court found that the plaintiff "did not meet his obligation 'not to assume the worst.' " *Id.* In *Garner*, a Title VII case, a former manager, returning from maternity leave, was assigned to a lesser position and quit after working one day, even though her pay was not reduced. *Garner* at 1539. The court found that it was not reasonable to resign after only one day under circumstances where there was no evidence of harassment of any kind. *Id.* Plaintiff argued that *Flanagan* was not dispositive because the plaintiffs "was subjected to no[] on going pattern of harassment, never complained of any harassment, and was not offered an illegal demotion" and that *Garner* was not dispositive because the plaintiff was assured that she would be given a management position as soon as one was available.

Although the jury found that "the defendants demote[d] plaintiff in retaliation for her testimony in the *Holman* case," the question of whether plaintiff was discharged in retaliation for her testimony was not presented to the jury. Neither party denies that plaintiff was discharged for insubordination because she refused to accept the demotion. Neither party denies that plaintiff was told that she would receive no pay reduction because of the

demotion. No evidence was presented at trial to show that plaintiff was subjected to harassment by her superiors prior to the demotion. Plaintiff, however, argued that she was "constructively discharged" in that, under the circumstances, it was impossible for her to accept the demotion. Plaintiff further argued that, by making the back pay award that it did, the jury implicitly found that plaintiff was discharged in retaliation for her testimony in the *Holman* case.

The court finds that *Flanagan* and *Garner* are controlling and that, under the circumstances of the captioned case and as a matter of law, plaintiff was not constructively discharged by defendants. Therefore the court finds that defendants are entitled to judgment as a matter of law on plaintiff's claim of retaliatory discharge under the ADEA.

2) Negligent Supervision and Retention Under Georgia Common Law

Under Georgia law, "[a]n indefinite hiring may be terminated at will by either party." O.C.G.A. § 34-7-1. The court previously determined that plaintiff in the captioned case was an at-will employee. Order of September 4, 1991 at 6. Because plaintiff was an at-will employee, defendants could discharge, or demote, her for any reason or for no reason, unless prohibited by a state or federal statute. *See, Borden v. Johnson*, 196 Ga. App. 288 (1990), *cert. denied.*, 1990 Ga. LEXIS 535 (Ga. Sept. 27, 1990) ("[A]n at-will employee whose employment is 'wrongfully' terminated in violation of the 'public policy' that is established by specific *state or federal statutes* may pursue his applicable *statutory remedy* without being barred by the proposition that an employer otherwise incurs no liability for discharging an at-will employee." (emphasis in original)). *See also, Lane v. K-Mart*

Corp., 190 Ga. App. 113 (1989) ("The rule in Georgia remains hard and fast that an employer is free to discharge an employee at will for any or no reason, and that the employer's motives in discharging such an employee are legally immaterial.")

The ADEA prohibits not only discrimination on the basis of age but also discrimination based on an individual's opposition to age discrimination or an individual's charge, testimony, assistance, or participation in an investigation, proceeding, or litigation based on age discrimination. 29 U.S.C. § 623(d). Thus, where an employee has been subjected to discrimination based on retaliation for assisting someone pursue a claim under the ADEA, "[her remedy] is under federal law and not under the theory that she has a viable state tort claim." *Borden*, 196 Ga. App. at 290.

The ADEA authorizes "[a]ny person aggrieved" to bring suit "for such legal or equitable relief as will effectuate the purposes of this chapter." 29 U.S.C. § 626(c)(1). The ADEA also specifically provides for liquidated damages when the ADEA is willfully violated. 29 U.S.C. § 626(b). The Fifth Circuit determined that the ADEA's "silence as to punitive damages . . . was intentional" and that "neither general damages [(compensatory damages for psychosomatic injuries)] nor punitive damages are recoverable in private actions posited upon the ADEA." *Dean v. American Security Insurance Co.*, 559 F.2d 1036, 1037, 1039-40 (5th Cir. 1977), *cert. denied* 434 U.S. 1066 (1978). The *Dean* court found that permitting general damages "might well . . . frustrate rather than effectuate the purposes of the [ADEA]" and that the provision for liquidated damages would "effectively supply the deterrent [which] punitive damages normally serve." *Id.* This holding has consistently been followed by courts within the Eleventh Circuit. *See e.g*, *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1446 (11th Cir. 1985),

cert. denied 474 U.S. 1005 (1985) ("neither punitive damages nor compensatory damages for pain and suffering are recoverable under the ADEA"); *McLaren v. Emory University*, 705 F. Supp. 563, 566 (N.D. Ga. 1988) (Camp, J.) ("compensation for non-pecuniary losses which include damage to his good name and reputation, loss of professional standing, emotional distress, and pain and suffering . . . are not recoverable under the ADEA"); *Higdon v. Concast Cable Communications. Inc.*, 708 F. Supp. 1584 (N.D. Ala. 1987) ("[d]amages for mental anguish, emotional distress and injury to reputation are not recoverable under the ADEA"); *Lyons v. Allendale Mutual Insurance Co.*, 484 F. Supp. 1343 (N.D. Ga. 1980) (Hall, J.) (the ADEA does not "allow recovery of general damages").

Although *Borden* speaks specifically to a state tort claim of "wrongful termination," the court believes that the Georgia courts would apply the same rule to a state tort claim of "negligent retention or supervision" under the circumstances of the captioned case. In the captioned case, the only underlying act to the negligent supervision claim was the personnel decision to demote plaintiff.[4] The court has not been able to find, and neither party cited, any Georgia case dealing directly with a similar situation. Because compensatory and punitive damages are not available under the ADEA and have been found to frustrate the goals of the ADEA, the court does not believe that the Georgia courts would permit a plaintiff to make an "end-run" around the remedial provisions of the ADEA by allowing a plaintiff to seek compensatory and punitive damages under a state law negligent retention and supervision claim. As defendants have suggested, it

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4. Although plaintiff argued that she has always contended that the actions taken against her were never solely personnel decisions, she did not, at trial, present evidence of other discriminatory actions by her supervisors.

would be "nonsensical to preclude tort liability when an employer deliberately makes an unlawful personnel decision, yet impose tort liability for negligently allowing subordinate agents to make the very same decision." Therefore, under the specific circumstances of the captioned case, the court finds that defendants are entitled to judgment as a matter of law on plaintiff's state law negligent supervision and retention claim.

3) Punitive Damages

The ADEA does not provide for an award of punitive damages. *Dean*, 559 F.2d at 1040. The Georgia Code limits an award of punitive damages in tort to those circumstances "in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1 (b). Because punitive damages "serve the criminal law goal of deterrence," "[n]egligence, even gross negligence, is inadequate to support a punitive damage award." *Colonial Pipeline Co. v. Brown*, 258 Ga. 115, 118 (1988), *appeal dismissed*, 488 U.S. 805 (1988)..

The jury determined that "[b]oth Ron Cannegieter and Joe Cibulski" were "the decision-makers in the decision to demote [plaintiff]." To justify an award of punitive damages in the captioned case, therefore, plaintiff had to prove by clear and convincing evidence that someone in a position of authority over both Cannegieter and Cibulski was willfully negligent or consciously indifferent to the consequences of negligent supervision. Plaintiff argued that the evidence showed that Cannegieter was willfully negligent or consciously indifferent in supervising Cibulski. Because Cibulski and Cannegieter jointly

made the decision to demote plaintiff, Cannegieter's supervision of Cibulski, even if willfully negligent, is not sufficient to justify an award of punitive damages. Plaintiff also argued that the evidence showed that Richard Powers was willfully negligent or consciously indifferent in supervising Cannegieter and Cibulski. The evidence presented at trial, however, showed that Powers made conscious efforts to prevent any retaliation against plaintiff. Plaintiff, therefore, failed to prove any entitlement to punitive damages. Both because plaintiff failed to prove any entitlement to punitive damages and because the court found that defendants are entitled to judgment as a matter of law on plaintiff's state law negligent supervision and retention claim, the court finds that defendants are entitled to judgment as a matter of law on the issue of punitive damages.

4) Compensatory Damages

The ADEA does not provide for an award of compensatory damages. *Dean*, 559 F.2d at 1040. Defendants argued that plaintiff should be prohibited from receiving compensatory damages on her Georgia negligent supervision and retention claim because she did not, in her responses to interrogatories, identify compensatory damages as an item of damages she was seeking to recover and because, in defendants' motion in limine to exclude evidence of alleged emotional distress, which was granted by the court order of September 3, 1992, defendants used the terms "emotional distress" and "compensatory damages" interchangeably. Plaintiff argued that she should not be precluded from recovering compensatory damages because there are many elements of compensatory damages, the court order of September 3, 1992 excluded only claims of emotional distress, and defendants did not object to other forms of compensatory damages prior to trial. Defendants responded that court did not intend to make "some esoteric distinction between

'compensatory' damages, 'emotional distress' damages, and damages for 'pain and suffering.'

On July 9, 1992, defendants filed a motion in limine to "exclude evidence of alleged emotional distress." Defendants argued that plaintiff never mentioned compensatory damages for emotional distress until she attempted to file a second amended complaint[5] several months after the close of discovery. On September 3, 1992, finding that plaintiff had not sufficiently identified her claim for damages for emotional distress and that "[e]xclusion of evidence may be an appropriate sanction for failure to supplement interrogatories," the court granted defendants' motion in limine and ordered that "plaintiff is precluded from testifying about, offering any evidence on, or making any reference to emotional distress during the trial of this case." The court finds that, under the circumstances of the captioned case, damages for "pain and suffering" are identical to damages for "emotional distress" and were excluded by the September 3, 1992 order. Both because "pain and suffering" were excluded by the September 3, 1992 order and because the court found that defendants are entitled to judgment as a matter of law on plaintiff's state law negligent supervision and retention claim, the court finds that defendants are entitled to judgment as a matter of law on the issue of compensatory damages.

5) Back Pay

Under the ADEA, a plaintiff who proves a violation may recover lost wages and benefits. 29 U.S.C. § 626(b). The ADEA also provides for liquidated damages equal to the amount of lost wages, if the violation is willful. *Id.* Although there is no clear

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5. The court denied plaintiff's motion to file a second amended complaint.

authority as to whether the ADEA permits an award of nominal damages, "[t]he district court has broad discretion in selecting remedies as long as the relief granted is consistent with the purposes of the ADEA." *Verbraeken v. Westinghouse Electric Corp.*, 881 F.2d 1041, 1052 (11th Cir. 1989), *cert. dismissed*, 493 U.S. 1064 (1990). "[T]he purpose of the ADEA, insofar as the individual plaintiff is concerned, is to make the plaintiff 'whole,' to restore the plaintiff to the economic position the plaintiff would have occupied but for the illegal discrimination of the employer." *Id.* (quoting *Castle v. Sangamo Weston. Inc.*, 837 F.2d 1550, 1563 (11th Cir. 1988)). At least one court within the Northern District of Georgia has refused to permit an award of nominal damages. *McLaren*, 705 F.Supp. at 568 (Camp, J.). "The Court has found no authority under the ADEA sanctioning [an award of nominal damages]." *Id.* A court within the Middle District of Georgia, however, found that "[an award of nominal damages] if consistent with the purposes of the ADEA." *Grimes v. City of Fort Valley*, 773 F. Supp. 1536, 1538 (M.D.Ga. 1991) (Fitzpatrick, J.).

In the captioned case, the jury found that plaintiff had been demoted in retaliation for her testimony in the *Holman* case. However, plaintiff was demoted without a reduction in pay and was legitimately discharged for insubordination within forty-five minutes of her demotion. Plaintiff therefore suffered no lost wages or benefits due to the demotion and no award is necessary "to make [her] whole [or] to restore [her] to the economic position [she] would have occupied but for the illegal discrimination." *Verbraeken*, 881 F.2d at 1052. Under the circumstances of the captioned case, plaintiff is not entitled to an award of back pay, not even an award of nominal damages.[6] The

6. The court need not consider whether nominal damages would ever be available under the ADEA.

court finds that defendants are entitled to judgment as a matter of law on the issue of back pay.

6) Retaliatory Demotion

The jury specifically found that defendants demoted plaintiff in retaliation for her testimony in the *Holman* case. Defendants argued that, regardless of the jury's assessment of the evidence, the charge cannot be sustained because there is no relief to which plaintiff is entitled on this claim and to "enter a declaratory judgment of liability ... would be an advisory opinion." Plaintiff argued that declaratory judgment is available under the ADEA even if damages are not recoverable.

"In a case of actual controversy within its jurisdiction ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C § 2201(a). A "controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240-41 (1937).

Although plaintiff is not entitled to back pay or to reinstatement under the facts as proved at trial, the court finds that there is an actual controversy and that a declaration of plaintiff's legal rights is appropriate. Defendants are not entitled to judgment as a matter of law on plaintiff's claim of retaliatory demotion under the ADEA.

Appendix D

MOTION FOR LEAVE TO FILE AND MOTION TO STRIKE

The local rules of the Northern District of Georgia permit the filing of a motion, a response to the motion, and a reply by the movant but prohibit the filing of any other briefs "except upon order of the Court." L.R. 220-1(b)(2) N.D.Ga. Plaintiff filed a motion for leave to file a sur-reply in opposition to defendants' motion for a new trial. Plaintiff argued that "Defendants grossly misinterpret a number of cases upon which Plaintiff relies, misstate Plaintiff's position on a number of issues, and advance baseless arguments in support of the Motion."

To the extent that defendants' reply brief contains misrepresentations of the law and baseless arguments, the court is fully capable of discerning and interpreting the applicable law. The court is also capable of determining plaintiff's position from the brief filed in response to the motion. Further, as this case has been tried in open court, the court is fully capable of determining the facts which were presented in evidence. The court finds that plaintiff's sur-reply is neither necessary nor justified and that plaintiff should not be allowed, without justification, to have the last word on a motion filed by defendants.

Defendants filed a motion to strike plaintiff's sur-reply brief. Because the court has found that the sur-reply is not justified and should not be permitted, defendants' motion to strike is moot.

MOTION FOR NEW TRIAL

Defendants' Argument

Defendants initially went to great lengths to show how the evidence presented at trial supported their argument that plaintiff

had been demoted for a legitimate, non-discriminatory reason. Defendants argued that the failure to separate the evidence and arguments regarding the amount of punitive damages from all other issues constituted prejudicial error; that the ADEA verdict was contrary to the great weight of the evidence, was excessive, and produced a miscarriage of justice; that evidence of negligence should have never been admitted and needlessly confused the jury; and that the court failed to properly instruct the jury on the claims of negligence and punitive damages.

Plaintiff's Arguments

Plaintiff initially stated that no substantial prejudice resulted from any alleged errors and that the verdicts of the jury should be allowed to stand. Plaintiff's further stated that defendants arguments were "disingenuous, insufficient, and fail[ed] as a matter of fact and law." Plaintiff argued that a new trial may be granted only if any errors are substantial enough to deny a fair trial; that, in weighing evidence, the court may not substitute its judgment of credibility for that of the jury; and that the court must look at the adequacy of the jury charge as a whole in informing the jury of the law. Plaintiff also argued that there is no requirement in the federal courts that the amount of punitive damages be bifurcated from all other issues and that the court's bifurcation of liability and damages was sufficient to prevent any prejudice; that the evidence produced at trial was sufficient to support the jury verdict; that inclusion of evidence on the negligence claim was not prejudicial; and that the jury instructions, taken as a whole, were sufficient to avoid prejudicial error.

Legal Standard and Analysis

A motion for a new trial under Rule 59 may be

> joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative.
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> . . .
>
> If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial.

Fed. R. Civ. P. 50(b), (c)(1).

In the captioned case, defendants filed both a motion for judgment as a matter of law and a motion for a new trial. Pursuant to Fed. R. Civ. P. 50, defendants requested that the court make a conditional ruling on the motion for a new trial even if the court granted defendants' motion for judgment as a matter of law.

"A new trial may be granted to all or any of the parties and on all or part of the issues . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Fed. R. Civ. P. 59(a).

> When ruling on a motion for a new trial, a judge must determine "if in his opinion, 'the verdict is against the clear weight of the evidence . . . or will result in a miscarriage of justice, even though there may be substantial

evidence which would prevent the direction of a verdict.' "

Hewitt v. B.F. Goodrich Co., 732 F.2d 1554, 1556 (11th Cir. 1984). Furthermore, "to assure that the judge does not simply substitute his judgment for that of the jury, . . . we have noted that new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great — not merely the greater — weight of the evidence." *Id.*; *see also Popham v. City of Kennesaw*, 820 F.2d 1570, 1576-77 (11th Cir. 1987).

On the issue of retaliatory demotion under the ADEA, the court finds that the jury's verdict was not contrary to the great weight of the evidence. The issue of retaliatory discharge was not directly submitted to the jury. To the extent that the jury indirectly determined that plaintiff was discharged in violation of the ADEA and to the extent that plaintiff's claim of retaliatory discharge is not precluded as a matter of law, the court finds that the jury's verdict was not contrary to the great weight of the evidence. To the extent that plaintiff's claim of negligent supervision and retention is not barred as a matter of law, the court finds that the jury's verdict on defendants' negligence was not contrary to the great weight of the evidence. To the extent that plaintiff's negligence claim is not barred as a matter of law and that an award of punitive damages may be based on the behavior of Cannegieter alone, the court finds that the jury's determination that plaintiff is entitled to punitive damages is not contrary to the great weight of the evidence. To the extent that punitive damages must be based on the behavior of persons in positions superior to that of Cannegieter, the court finds that the jury's award of punitive damages is contrary to the great weight of the evidence. To the extent that plaintiff's negligence claim is not barred as a matter of law and that damages for "pain and suffering" were not

barred by the September 3, 1992 order, the court finds that the jury's determination that plaintiff is entitled to compensatory damages is not contrary to the great weight of the evidence. To the extent that plaintiff's claim of retaliatory discharge is not barred as a matter of law and that plaintiff is not denied nominal damages as a matter of law, the court finds that the jury's determination that plaintiff is entitled to back pay is not contrary to the great weight of the evidence.

Georgia law requires that "the trier of fact shall first resolve from the evidence produced at trial whether an award of punitive damages shall be made." O.C.G.A § 51-12-5.1(d)(1). If a jury determines that a plaintiff is entitled to punitive damages, "the trial shall immediately be recommenced in order to receive such evidence as is relevant to a decision regarding what amount of damages will be sufficient to deter, penalize, or punish the defendants." O.C.G.A. § 51-12-5.1(d)(2). As the captioned case was brought pursuant to the court's jurisdiction under the ADEA and not pursuant to the court's diversity jurisdiction, the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), is not directly applicable and the court need not consider the Georgia law requiring bifurcation of the issues of liability for and the amount of punitive damages. Under the Federal Rules of Civil Procedure, the decision of whether to bifurcate any part of a trial is within the discretion of the trial judge. Failure to follow the Georgia law requiring bifurcation does not entitle defendants to a new trial.

To the extent that plaintiff's claims are not barred as a matter of law, the court finds that the jury was not able to distinguish the evidence relevant to the various individual issues. The court finds that the special interrogatory verdicts and the instructions given to the jury were not sufficient to guide the jury in distinguishing the relevant evidence and that prejudice resulted. The court finds that defendants are entitled to a new trial on all issues.

Appendix D

MOTION FOR HEARING

Although plaintiff filed a motion for a hearing on equitable relief, plaintiff did not suggest any equitable relief which might be available. Nor did she request any equitable relief. Plaintiff did note that she believed that the court wanted to defer ruling on equitable matters until post-trial matters were resolved. It is not the function of the court to advise plaintiff on the equitable relief available to her. If plaintiff still desires and believes she is entitled to equitable relief, she may file a motion requesting the particular equitable relief to which she believes she is entitled. She may also, at that time, file a motion for a hearing on the matter.

CONCLUSION

Having found that defendants are entitled to judgment as a matter of law on the issues of retaliatory discharge under the ADEA and negligent retention and supervision under Georgia tort law and on all damages issues, the court grants defendants' motion for judgment as a matter of law as to those issues [156-1]. However, having found that defendants are not entitled to judgment as a matter of law on the issue of retaliatory demotion under the ADEA, the court denies defendants' motion for judgment as a matter of law as to plaintiff's retaliatory demotion claim. Having found that plaintiff showed no justification for submitting a sur-reply to defendants' motion for a new trial, the court denied plaintiff's motion for leave to file [168-1] and denies as moot defendants' motion to strike [171-1]. Having found that defendants are entitled to a new trial, but having also found that defendants are entitled to judgment as a matter of law on all issues except retaliatory demotion, the court conditionally grants defendants' motion for a new trial [155-1] if this court's judgment

as a matter of law is vacated or reversed. Having found that plaintiff requested no equitable relief, the court denies plaintiff's motion for a hearing on equitable relief [154-1]. Because the question of attorneys' fees, costs, and expenses was resolved by the November 4, 1993 consent order, the court denies as moot plaintiff's petition for attorneys' fees, costs, and expenses [157-1].

IT IS SO ORDERED this 31st day of March, 1994.

s/ William C. O'Kelley
WILLIAM C. O'KELLEY
Chief United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION FILED SEPTEMBER 3, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL NO. 1:90-cv-875-WCO

JEANIE M. BOYETTE

VERSUS

AMERICAN INTERNATIONAL ADJUSTMENT COMPANY, INC., et al.

ORDER

The captioned case is on the court's current trial calendar and is before the court on the defendants' motion in limine; the defendants seek to bar the plaintiff from testifying about, offering evidence on, or making any reference to emotional distress during the trial.

BACKGROUND

At the pre-trial conference for this case, the court denied the plaintiff's motion for leave to amend her complaint a second time to include a claim for intentional infliction of emotional distress. The court stated:

> [T]he court has denied plaintiff's motion to amend the complaint and therefore any claim

> relating to intentional infliction of emotional distress is not in the case and should not be referred to in voir dire, opening statements or evidence ***unless*** there is a damages issue to which the defendant's attention has been called during discovery by appropriately and clearly identified answers indicating claim for such is being made.

Order of June 15, 1992, at 1.

The defendant asserts that the plaintiff never mentioned an intent to seek damages for emotional distress in her original or amended complaint or in her response to interrogatory number 3, which requested information concerning each element of damages she intended to seek for each count and the factual basis for each. With regard to count IV of her complaint (negligent retention), she merely stated that she sought punitive damages. The first indication that the plaintiff intended to claim emotional distress, states the defendant, came in her motion for leave to file a second amended complaint to assert a claim for intentional infliction of emotional distress, which was filed five months after the close of discovery and was denied by the court on June 15.

In response to the defendant's request to supplement interrogatory responses, the plaintiff stated in November of 1991 that she intended to seek damages for emotional distress, but did not specify the facts upon which she based that claim (apparently the motion to amend was filed about the same time). Repeated requests by the defendant to specify the facts supporting emotional distress have met with no response. The defendant therefore seeks to exclude any evidence at trial regarding emotional distress.

Appendix E

ANALYSIS

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:
>
> . . .
>
> A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

Fed. R. Civ. P. 26(e)(2). The defendant contends that the plaintiff was under a duty to supplement her response to the interrogatory seeking information on all the elements of damages the plaintiff was seeking under each count, and the factual basis for each; because the plaintiff waited to inform defendants of her emotional distress damages claim until after the close of discovery, the defendant wishes to have any evidence on that issue excluded. Defendant relies for this motion on the court's order of June 16, 1992, and on *Murphy v. Magnolia Elec. Power Assoc.*, 639 F.2d 232 (5th Cir. 1981).

Exclusion of evidence may be an appropriate sanction for failure to supplement interrogatories, and "the district judge

enjoys considerable discretion in determining when it is properly imposed." *Murphy*, 639 F.2d at 234. The Eleventh Circuit has held that the factors to be considered by the court determining whether evidence should be excluded are: (1) the explanation, if any, for the failure to present the evidence, (2) the importance of the evidence to be excluded, (3) the need for time to prepare to meet the evidence, and (4) the possibility of a continuance. *Alimenta (U.S.A.). Inc. v. Anheuser-Busch Cos.*, 803 F.2d 1160, 1163 (11th Cir. 1986) (citing *Murphy*, 639 F.2d at 235).

In this case, the plaintiff's explanation for not informing the defendants of her intent to claim damages for emotional distress is that she was not required to specifically plead that item of damages in her complaint, and that she was too occupied with motions for summary judgment to supplement her interrogatory responses, which she concedes "inadvertently omitted" any mention of damages for emotional distress. She further contends that if her emotional distress claim was not disclosed to the defendants until after the close of discovery, it is because the defendants did not ask her to supplement her interrogatory responses until that time. In making this argument, the plaintiff ignores the above-quoted language of Federal Rule 26(e)(2), which places a duty upon her to supplement her responses if she learns that they were or have become incorrect. Further, the court finds her explanations for not raising this claim earlier to be inadequate.

Although this belated claim for damages for emotional distress is only one damages component among many others that were timely raised, to allow this claim to be added at this late stage would require discovery to be reopened. In turn, motions for summary judgment would ensue, and this case would be delayed even further. The court notes that there have been four

extensions of discovery in this case, and that the case is set for the current trial calendar.

In light of these considerations as well as this court's order of June 16, 1992, the court therefore grants the defendants' motion in limine [97-1]. The plaintiff is precluded from testifying about, offering any evidence on, or making any reference to emotional distress during the trial of this case.

IT IS SO ORDERED this 3rd day of September, 1992.

s/ William C. O'Kelley
WILLIAM C. O'KELLEY
Chief United States District Judge

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION FILED JANUARY 15, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL NO. 1:90-cv-875-WCO

JEANIE M. BOYETTE

VERSUS

AMERICAN INTERNATIONAL ADJUSTMENT CO., INC., et al.

ORDER

The captioned case is presently before the court on plaintiff Jeanie M. Boyette's ("plaintiff") motion to amend her complaint. After careful review, the court denies plaintiff's motion for the reasons stated herein.

DISCUSSION

On April 23, 1990, plaintiff instituted the captioned lawsuit against defendants American International Adjustment Co., Inc. and American International Group, Inc. ("defendants"). In her original complaint, she asserted four claims relating to defendants' termination of her employment after she gave deposition testimony that was unfavorable to defendants in an employment discrimination case involving a co-worker. On October 19, 1990, plaintiff filed a motion to amend her complaint to include new factual allegations relating to one claim asserted

in her original complaint. The court then granted this motion on December 3, 1990. The discovery period ended on June 15, 1991, after several extensions of the discovery period. On September 4, 1991, the court granted in part and denied in part defendants' motion for summary judgment. The case was scheduled for trial on the court's trial calendar commencing December 9, 1991, but it was removed upon request of counsel. *See* Docket Nos. 86, 88. The pretrial order was due on January 15, 1992, and no new trial date has been scheduled.

Under Rule 15(a), Fed. R. Civ. P., "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Although the decision whether to grant leave to amend a pleading is within the district court's discretion, such a motion should be granted unless a substantial countervailing reason exists. *Nolin v. Douglas County,* 903 F.2d 1546, 1550 (11th Cir. 1990); *Shipner v. Eastern Air Lines. Inc.,* 868 F.2d 401, 406-07 (11th Cir. 1989); *Halliburton & Assocs. v. Henderson. Few & Co.,* 774 F.2d 441, 443 (11th Cir. 1985); *Henson v. Columbus Bank & Trust Co.,* 770 F.2d 1566, 1574 (11th Cir. 1985); *Nilsen v. City of Moss Point, Mississippi,* 621 F.2d 117, 126 (5th Cir. 1980); *Mullinax v. McNabb-Wadsworth Truck Co.,* 117 F.R.D. 694, 695-96 (N.D. Ga. 1987) (Shoob, J.). Examples of reasons justifying the denial of leave to amend a party's pleading include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of the amendment. . . ." *Foman v. Davis,* 371 U.S. 178, 182 (1962).

In her motion to amend, plaintiff Boyette seeks to add a claim for intentional infliction of emotional distress arising from

defendants' termination of her employment. Plaintiff asserts that prior to November 1, 1991, she was barred from bringing a claim of intentional infliction of emotional distress under the facts alleged in her complaint, but now, in light of the Georgia Supreme Court's November 11, 1991 decision in *Yarbray v. Southern Bell,* such a claim is legally cognizable. *See* Docket No. 85, Brief in Support of Plaintiff's Motion to Amend Complaint at 4. Accordingly, plaintiff contends that it would be reasonable and equitable to permit her to amend her complaint to include this new claim, *Id.* at 8. The court disagrees.

The tort of intentional infliction of emotional distress is a well-recognized cause of action under Georgia law. *Bridges v. Winn-Dixie Atlanta. Inc.,* 176 Ga. App. 227, 229, 335 S.E.2d 445 (1985); *Thomas v. Ronald A. Edwards Construction Co. Inc.,* 163 Ga. App. 202, 204, 293 S.E.2d 383 (1982); *Dunn v. Western Union – Tel. Co.,* 2 Ga. App. 845, 853, 59 S.E. 189 (1907). Whether a plaintiff presents sufficient evidence for his or her claim to be determined by a jury is a question of law. *Gordon v. Frost,* 193 Ga. App. 517, 521, 388 S.E.2d 362 (1989). Until the Georgia Supreme Court's decision in *Yarbray,* the applicable standard was that the plaintiff had to prove that "defendant's actions were so terrifying or insulting as naturally to humiliate, embarrass or frighten the plaintiff." *Bridges,* 176 Ga. App. at 229 (quoting *Georgia Power Co. v. Johnson,* 155 Ga. App. 862, 863, 274 S.E.2d 17 (1980)).

In *Yarbray v. Southern Bell Tel. & Tel. Co.,* 197 Ga. App. 846, 399 S.E.2d 718 (1990), *aff'd in part and rev'd in part,* 409 S.E.2d 835 (Nov. 1, 1991) the Georgia Court of Appeals applied this standard from *Bridges* and held that the trial court correctly had granted summary judgment in favor of the defendant. The facts of *Yarbray* involved similar circumstances as presented in the

captioned case; the plaintiff in each case gave testimony adverse to her employer regarding the employer's employment policies and was subsequently terminated. *Id.* at 848. On appeal, the Georgia Supreme Court applied a slightly different standard than was applied by the Georgia Court of Appeals: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Yarbray v. Southern Bell,* 409 S.E.2d 835, 837 (Nov. 1, 1991) (quoting Restatement (2d) of Torts § 46(1) (1965)). After evaluating the facts of plaintiff's claim, the Georgia Supreme Court held that the plaintiff's allegations of intentional infliction of emotional distress were sufficient to create a jury issue and accordingly reversed the Court of Appeals' ruling on this issue. *Id.* at 838.

Neither the Georgia Court of Appeals' decision in *Yarbray* nor the Georgia Supreme Court's subsequent reversal thereof altered the availability of a claim of emotional infliction of emotional distress to plaintiff Boyette. The court recognizes that the Georgia Court of Appeals' decision in *Yarbray* would be unfavorable to such a claim by plaintiff because of the factual similarities. However, plaintiff filed her original complaint and her first motion to amend her complaint prior to the time that the Georgia Court of Appeals decided *Yarbray;* accordingly, this decision could not have influenced plaintiff's omission of a claim for intentional infliction of emotional distress in her original complaint or in her first amended complaint. The Georgia Supreme Court's subsequent reversal did not change the law in any significant substantive way. Rather, the Georgia Supreme Court simply applied the test for a claim of intentional infliction of emotional distress using slightly different language and reversed the Georgia Court of Appeals' finding that the plaintiff

had not set forth sufficient evidence to survive summary judgment.

Because a cause of action for intentional infliction of emotional distress under Georgia law has been available to plaintiff since April 23, 1990, when she filed her original complaint, until the present time, the court finds undue delay on the part of plaintiff in waiting until after the close of discovery and just prior to the submission of the pretrial order to seek to add this claim. In addition, the court finds that undue prejudice would result to defendants if plaintiff were allowed to amend her complaint. Under Georgia law, the plaintiff has the burden to show outrageous and egregious conduct by defendants as well as severe emotional distress; in this case, the court finds as a matter of law that plaintiff's allegations fail to show either requirement. Allowing plaintiff to amend her complaint to assert a cause of action for intentional infliction of emotional distress therefore necessarily would require additional factual allegations.[1] Because discovery is now closed and the case is nearly ready for trial, it would be prejudicial to defendants to reopen discovery at this late date. Last, the court finds that allowing plaintiff to amend her complaint would be futile because, as stated above, the facts alleged by plaintiff in her complaint fail as a matter of law to show

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1. Plaintiff contends that additional factual allegations are not necessary to support her new theory of liability. Brief in Support of Plaintiff's Motion to Amend Complaint, Docket No. 85 at 7. Relying on the facts of *Yarbray*, which she argues are "incredibly analogous to the case at bar," she asserts that her claim of emotional infliction of emotional distress is legally cognizable under the facts presently alleged. *Id.* at 2. *Yarbray* involved allegations that the defendant had verbally threatened the plaintiff with the loss of her job, directed her as to how she should testify, and verbally abused her in other ways. Because no similar allegations have been made in the captioned case, the court finds that *Yarbray* does not mandate recognizing the viability of plaintiff's claim of intentional infliction of emotional distress in this case.

either that defendants' conduct was outrageous and egregious or that plaintiff suffered severe emotional distress therefrom.[2] For the foregoing reasons, the court will deny plaintiff's motion to amend her complaint to include a claim of intentional infliction of emotional distress. Fed. R. Civ. P. 15(a).

CONCLUSION

The court hereby denies plaintiff Boyette's motion to amend her complaint (Docket No. 85).

IT IS SO ORDERED this 15th day of January, 1992.

s/ William C. O'Kelley
WILLIAM C. O'KELLEY
Chief United States District Judge

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2. On the contrary, plaintiff's allegations indicate that defendants treated plaintiff well in order to persuade her to give testimony favorable to them. The only exceptions are the letter of discipline she allegedly received after giving her testimony and a general allegation that plaintiff was "subjected to disparate treatment at work and was improperly evaluated in retaliation for giving said testimony." Complaint, Docket No. 1 at 3, paras. 10, 11.

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION FILED SEPTEMBER 4, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL NO. 1:90-cv-875-WCO

JEANIE M. BOYETTE

VERSUS

AMERICAN INTERNATIONAL ADJUSTMENT CO., INC., et al.

ORDER

The captioned case is presently before the court on: (1) plaintiff Jeanie M. Boyette's motion to extend the discovery period to July 29, 1991; (2) plaintiff's motion for relief from Local Rule 225-2(a); (3) defendants American International Adjustment Co., Inc.'s and American International Group, Inc.'s motion for summary judgment; and (4) plaintiff's motion for addition of citation to her reply brief in support of her motion to extend discovery. After careful review, the court denies plaintiff's motion to extend discovery and denies plaintiff's motion for relief from Local Rule 225-2(a). The court grants defendants' motion for summary judgment as to counts two and three and denies their motion as to counts one and four. Last, the court grants plaintiff's motion for addition of citation to her reply brief in support of her motion to extend discovery.

Appendix G

FACTUAL BACKGROUND

Plaintiff Boyette was employed by defendants in their Atlanta, Georgia office at all relevant times as a "supervisor" until her termination on April 18, 1989. On September 23, 1988, Boyette gave deposition testimony in an age discrimination case brought by a co-worker that was damaging to defendants.[1] In the captioned case, Boyette alleges that defendants took various actions during the time period of her scheduled deposition in the *Holman* case in order to influence her testimony. Boyette further alleges that subsequent to September 23, 1988, defendants took certain actions that constituted retaliation against Boyette for giving deposition testimony in *Holman*. Finally, on April 18, 1989, Boyette met with her supervisors, Ron Cannegieter and Joe Cibulski, who informed her that she was being immediately demoted from her position as a supervisor. When Boyette refused to accept the demotion, defendants terminated her employment.

I. Plaintiff's Discovery Motions

On June 14, 1991, plaintiff filed an "Expedited Motion for Limited Extension of Discovery," seeking to extend the discovery period through July 29, 1991 for the purpose of pursuing limited discovery, and a "Motion for Relief from Local Rule 225-2," seeking to serve additional interrogatories and requests for production of documents on defendants. Defendants oppose both notions. As plaintiff states, issue was joined in this case on June 4, 1990. Several extensions of the discovery period have already been granted by the court: (1) on September 26, 1990, the court ordered that the discovery period be extended until January 2, 1991; (2) on March 12, 1991, the court granted

1. This case was captioned as *Holman v. American Interational Adjustment Co., Inc.*, 1:88-cv-1277-ODE (*Holman*).

plaintiff's request for an extension of time for discovery, filed by plaintiff on December 21, 1991, and extended the discovery period through April 15, 1991; (3) on May 3, 1991, the court approved a consent order extending the discovery period through May 20, 1991, to which the parties had agreed on April 24, 1991; and (4) on May 21, 1991, the court approved a consent order extending the discovery period through June 15, 1991, to which the parties had agreed on May 14, 1991.

In this last extension of the discovery period, the parties agreed that:

> the discovery period in the above-styled case be extended to and through June 15, 1991, for the purposes of taking the deposition of Reggie Bailey, and for the completion of any necessary discovery which may arise from new information revealed in the depositions of Reggie Bailey, Bob Witty, Rose Rappaport, Larry Dorman and Steve Gorman.

Consent Order for Extension of Discovery (filed May 21, 1991). Plaintiff noticed the deposition of Bob Witty for May 10, 1991, the deposition of Reggie Bailey for May 14, 1991, the deposition of Rose Rappaport for May 15, 1991, the deposition of Steve Gorman for May 16, 1991, and the deposition of Larry Dorman for May 17, 1991. In her current motion for extension of the discovery period, plaintiff states that "as a result of the recent depositions of Bob Witty and Steve Gorman, taken by Plaintiff, new information has come to light which has necessitated the filing of this motion . . . ." Plaintiff's "Expedited Motion for Limited Extension of Discovery" at 1. Plaintiff now seeks to take additional depositions of Axel Freud, Kevin Connelly, and Judith

Peterson, which she asserts is made necessary by the information disclosed in the depositions of Witty, Gorman, and Dorman. Plaintiff had approximately one month after the relevant depositions took place to complete any further necessary discovery; the court is of the opinion that this constituted adequate time to pursue such discovery. Accordingly, the court finds that insufficient cause has been shown by plaintiff to extend the discovery period yet again. *See* L.R. 225-1(a), N.D. Ga. Plaintiff's motion to extend the discovery period through July 29, 1991 is therefore denied.

Because the discovery period ended on June 17, 1991, no further interrogatories may be served by either party. Accordingly, plaintiff's motion for relief from Local Rule 225-2(a) is denied.

II. Defendants' Motion for Summary Judgment

Summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Because the procedure deprives the parties of a trial on the issues, the court must be careful to ensure that only those claims for which there is no need for a factual determination as to any material fact are disposed of by summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In addition, a court evaluating summary judgment motion must view the evidence in the light most favorable to the non-movant. *Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988); *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986), *reh'g denied*, 815 F.2d 66 (1987). To survive a motion for summary judgment, the non-moving party

need only present evidence from which the trier-of-fact might return a verdict in his or her favor. *Samples*, 846 F.2d at 1330.

In her complaint, Boyette asserts a variety of claims, all relating to defendants' actions concerning her employment from the time of her deposition testimony until when she was terminated.' Boyette states four claims: (1) count one — a claim of retaliatory discharge under the Age Discrimination in Employment Act, 29 U.S.C. sec. 623; (2) count two — common law tort and contract claims; (3) count three — a claim under the Georgia RICO statute; and (4) count four — a common law claim of negligent retention and hiring. Both plaintiff and defendants agree that Georgia law applies to plaintiff's common law claims. Defendants seek summary judgment as to all counts of plaintiff's complaint; she court shall address each count in turn.

A. Count One — Retaliatory Discharge

After reviewing the pleadings, depositions, and exhibits, the court finds that genuine issues of material fact exist regarding plaintiff's claim of retaliatory discharge. Accordingly, defendants' motion for summary judgment is denied with respect to count one of plaintiff's complaint.

B. Count Two — Tort and Contract Claims

In count two of her complaint, plaintiff alleges, with several references to New Jersey law, that she was terminated by defendants in bad faith and in violation of the terms and conditions of her employment as set forth in an employee handbook. Plaintiff now concedes that her only cognizable claim in count two is for wrongful termination under Georgia law. *See* Plaintiff's Response to Defendants' Motion for Summary

Judgment at 29. Accordingly, the court shall address this claim.

Under Georgia law, "[a]n indefinite hiring may be terminated at will by either party." O.C.G.A. sec. 34-7-1. Because plaintiff has failed to present any evidence that she was not hired on an indefinite basis, i.e., evidence of an employment contract for a specific time period, the court finds that plaintiff was an at-will employee of defendants. As an at-will employee, any improper motives for her termination are legally immaterial because defendants were free to discharge her for any or no reason. *Lane v. K-Mart Corp.*, 190 Ga. App. 113, 113, 378 S.E.2d 136 (1989); *Hall v. Answering Service. Inc.*, 161 Ga. App. 874, 875, 289 S.E.2d 533 (1982).

Plaintiff urges the court to recognize a "public policy" exception to the rule of at-will employment in this case, citing *A.L. Williams & Assoc. v. Faircloth*, 259 Ga. 767, 769 n.4, 386 S.E.2d 151 (1989) (principle of at-will employment "may not apply to discharge for a reason that is impermissible on grounds of public policy, such as a discharge based upon race"). The court declines to do so, however, based on the recent case of *Borden v. Johnson*, 196 Ga. App. 288, 395 S.E.2d 628 (1990), *cert. denied*, 260 Ga. (Sept. 27, 1990). In *Borden*, the Georgia Court of Appeals refused to create a public policy exception to the rule of at-will employment for a termination allegedly based on an employee's pregnancy. Noting *A.L. Williams*, the court declined to create judicially what was not available statutorily:

> [U]nless our General Assembly has created a specific exception to OCGA sec. 3[4]-7-1, an at-will employee has no viable state remedy in the form of a tort action for "wrongful" discharge against his or her former

> employer. . . . If appellant has any remedy, it is under federal law and not under the theory that she has a viable state tort claim.

Id. at 290.

Because plaintiff was an at-will employee and because no public policy exception exists in this case, plaintiff's claim of wrongful discharge under Georgia law fails as a matter of law. Defendants are accordingly entitled to summary judgment as to count two of plaintiff's complaint.

C. Count Three — Georgia RICO

In count three of her complaint, plaintiff claims that defendants engaged in a pattern of racketeering activity in violation of the Georgia Racketeers and Corrupt Organizations Act (RICO) when they attempted to influence her deposition testimony in the *Holman* case. *See* O.C.G.A. §§ 16-14-4(b) (prohibited activities); 16-14-3(2) (defining "pattern of racketeering activity"); 16-14-3(A)(xiv) (including acts of influencing witnesses as "racketeering activity"); 16-10-93 (defining crime of influencing witnesses). Plaintiff seeks civil remedies pursuant to section 16-14-6, which provides:

> (b) Any aggrieved person or the state may institute a proceeding under subsection (a) of this Code section [for injunctive relief].
>
> (c) Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages.

O.C.G.A. § 16-14-6 (b), (c). In order to pursue these remedies for defendants' alleged RICO violations, plaintiff must have standing. Although the issue of standing to sue under the Georgia RICO statute has not been directly addressed by the courts, the requirement of standing under the federal RICO statute, 18 U.S.C. § 1964, which is analogous to section 16-14-6(c) of the Georgia Code, has been well delineated in three cases.

First, in *Sedima. S.P.R.L. V. Imrex Co., Inc.*, 473 U.S. 479 (1985), the United States Supreme Court stated that a plaintiff had standing to sue under the federal RICO statute, 18 U.S.C. §§ 1961-1968, only if he or she "has been injured in his business or property by the conduct constituting the violation." *Id.* at 496. Furthermore, "the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern . . . ."

Second, in *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), the Eleventh Circuit addressed plaintiff's claim that he was wrongfully terminated from his employment in violation of his federal rights under various statutes, including the federal and Georgia RICO statutes. The plaintiff had been employed as an executive vice-president of the defendant bank. When he discovered a banking violation, reported the banking violation, and confronted the bank about it, the bank discharged him. Plaintiff sued, claiming that the defendant bank discharged him in retaliation for his act of reporting the banking violation. *Id.* at 928. After quoting *Sedima*, the court held that plaintiff lacked standing to sue under the federal RICO statute:

> [P]laintiff was not fired because he refused to participate in the bank's illegal scheme; therefore, [plaintiff's] injury, his discharge,

> did not flow directly from the predicate acts, the defendants' banking violations.

Id. at 933. The court then found that the plaintiff lacked standing to sue under the Georgia RICO statute because it is "essentially identical" to the federal RICO statute. *Id.*

The Eleventh Circuit expanded on *Sedima* and *Morast* in *O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, __ U.S.__, 110 S. Ct. 2620 (1990), which concerned a claim that plaintiffs were retaliatory terminated from defendant's employ after they confronted defendant about a mail fraud scheme and refused to participate in or conceal it. The court first set forth the requirements of standing for a federal RICO claim: "(1) a violation of section 1962 [prohibited activities]; (2) injury to business or property; and (3) that the violation caused the injury." *Id.* at 1561. The court next focused on the issue of standing and found that the "[t]he language 'by reason of' in section 1964(c) [identical to Georgia Code section 16-146(c)] imposes a proximate causation requirement on the plaintiffs." *Id.* The plaintiffs did not allege that they were injured by the predicate acts of mail fraud: rather, they alleged that their injury arose as a result of their refusal to participate in or conceal the fraud scheme. *Id.* The court thus concluded that plaintiffs had not demonstrated sufficient causation and therefore lacked standing:

> [B]y their own allegations, the proximate cause of the plaintiffs' injuries was [defendant's] decision to fire them for refusing to participate in or to conceal the scheme — not the mail fraud scheme itself.
>
> It may well be true that the commission of the predicate acts constituted the "but for"

> cause of the firings. However, that tenuous a relation between the harm and the predicate acts is not sufficient to confer standing.

Id. The court then discussed *Morast* but determined that a different issue was presented in that case because the plaintiff had been fired in retaliation for reporting a banking violation, not for refusal to participate in a fraud. However, the court further held:

> [T]here is no principled difference between a discharge for refusal to participate in the predicate acts alleged and a retaliatory discharge for reporting such illegal activity. In either case the injury does not flow directly from the predicate acts.

Id. at 1562.

In this case, the court follows *Morast* and *O'Malley* in determining whether plaintiff has standing or not for her Georgia RICO claim.[2] *See also Pelletier v. Zwiefel*, 921 F.2d 1465, 1499-1500 (11th Cir. 1991) ("[A] plaintiff has standing to sue under section 1964(c) only if his injury flowed directly from the commission of the predicate acts."). The predicate acts which plaintiff alleges constitute a pattern of racketeering activity all relate to defendants' various attempts to influence her deposition testimony. Plaintiff's alleged injury, the retaliatory discharge, was not proximately caused by defendants' predicate acts; rather,

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2. The language on which the requirement of standing is based ("injured by reason of") is utilized both in Georgia Code section 16-14-6(c) and section 1964(c), 18 U.S.C. In addition, the provision for injunctive relief in a Georgia RICO claim contains a similar standing requirement. *See* O.C.G.A. § 16-14F(b) ("[a]ny aggrieved person").

her injury arose from her refusal to be influenced as a witness. Although, as plaintiff points, this case may be distinguished from *Morast* and *O'Malley* because in this case plaintiff was directly involved in the predicate acts, such factual difference does not accord standing to plaintiff.[3] Because the requisite causation element is not present in this case, the court finds that plaintiff lacks standing to sue on her Georgia RICO claim. Accordingly, this claim fails as a matter of law; defendants are entitled to summary judgment as to count three of plaintiff's complaint.

D. Count Four — Negligent Retention and Hiring

After reviewing the pleadings, depositions, and exhibits, the court finds that genuine issues of material fact exist regarding plaintiff's claim of negligent retention and hiring. Accordingly, defendants' motion for summary judgment is denied with respect to count four of plaintiff's complaint.

CONCLUSION

The court hereby (1) denies plaintiff's motion to extend discovery, (2) denies plaintiff's motion for relief from Local Rule 225-2(a), (3) grants defendants' motion for summary judgment as to counts two and three and denies their motion as to counts one and four, and (4) grants plaintiff's motion for addition of citation to her reply brief in support of her motion to extend discovery.

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3. In addressing defendants' motion to dismiss count three of plaintiff's complaint, *see* Order dated December 3, 1990 at 8, the court noted this factual distinction. The court further stated that "at this point of the litigation, the court cannot conclude that the plaintiff can prove no set of facts that would establish a causal connection between the alleged racketeering activity and her discharge." The court now conclusively finds that an insufficient causal connection exists to give plaintiff standing.

Appendix G

IT IS SO ORDERED THIS 4th day of September, 1991.

s/ William C. O'Kelley
William C. O'Kelley
Chief United States District Judge